Form No. 7

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No. 6849

United States
Circuit Court of Appeals

For the Ninth Circuit

PACIFIC MIDWAY OIL COMPANY, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

PERNAU-WALSH PRINTING CO., 755 MARKET ST., SAN FRANCISCO

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS.

GEO. J. HATFIELD, U. S. Attorney.

ESTHER B. PHILLIPS, Asst. U. S. Attorney, Post Office Building, San Francisco, California.

Attorneys for Plaintiff and Appellee.

O. R. FOLSOM-JONES,

WILLIAM BRESNAHAN, 580 Market Street, San Francisco, California.

Attorneys for Defendant and Appellant.

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 18,306-K.

THE UNITED STATES,

Plaintiff,

vs.

PACIFIC MIDWAY OIL COMPANY, a Corporation,

Defendant.

COMPLAINT.

The above-named plaintiff, for a cause of action against the defendant, alleges as follows:

I.

At all times hereinafter mentioned the plaintiff was and now is a corporation sovereign and body politic.

II.

At all times hereinafter mentioned the defendant was and now is a corporation duly authorized, created and existing under and by virtue of the laws of the State of California, having its principal place of business in the City and County of San Francisco and in the Southern Division of the Northern District of California; that the residence and principal place of business of said defendant is in the said City and County and district as aforesaid, to wit, at Room 819 Mills Building, Corner of Montgomery and Bush Streets, therein. [1]*

III.

On the 26th day of February, 1918, defendant filed with the then Collector of Internal Revenue its income and profits tax return for the year 1917, from which it appeared that the defendant realized no net taxable income for said year; that on the 23d day of April, 1921, defendant filed an amended income and profits tax return, from which it appeared that defendant's net taxable income for said year was $1,613.90 and the tax due thereon was $96.84; that said tax was paid to the Collector of Internal Revenue for the First District of California at the time of the filing of the return; that on August 14, 1924, defendant filed a second amended income and profits tax return, from which it appeared that defendant's net taxable income for said year was $3,273.15 and the tax due thereon

*Page numbering appearing at the foot of page of original certified Transcript of Record.

was $196.39. Defendant having paid $96.84, an indicated balance of $99.55 was shown to be due, which was neither assessed by the Commissioner of Internal Revenue nor paid by the defendant. In March 1923, after an examination and audit of defendant's 1917 income tax returns, the Commissioner of Internal Revenue made an additional assessment of tax against the defendant in the sum of $5,076.32, which liability was adjusted as hereinafter set forth.

IV.

On April 15, 1919, defendant filed its income and profits tax returns for the year 1918, from which it appeared that defendant had realized no taxable income for said year. On April 23, 1921, defendant filed an amended income and profits tax return for said year, from which it appeared that defendant's net taxable income was $37,613.69 and the tax due thereon was $10,066.74 which was paid to the Collector of Internal Revenue for the First District of California at the time of filing the return. On August 14, 1924, defendant filed a second amended income and profits tax return, from which it appeared that defendant's net taxable income for said year was $3,718.36 and the tax [2] due thereon was $206.20, indicating an overpayment of $9,-860.54.

V.

On February 5, 1920, defendant filed its income and profits tax return for the year 1919, from which

it appeared that defendant had realized no taxable income for said year. On April 23, 1921, defendant filed an amended income and profits tax return, from which it appeared that defendant's net taxable income for said year was $46,803.14 and the tax due thereon was $7,480.58. Said tax was paid to the Collector of Internal Revenue for the First District of California on the date of the filing of said amended return. On August 14, 1924, defendant filed a second amended income and profits tax return, from which it appeared that defendant's net taxable income for said year was $4,919.55 and the tax due thereon $291.96, indicating an overpayment of $7,188.62.

VI.

On March 15, 1921, defendant filed its income and profits tax return for the year 1920, from which it appeared that its net taxable income for said year was $36,849.30 and the tax due thereon was $1644.39, which tax was paid to the Collector of Internal Revenue for the First District of California at the time of filing the return. On August 14, 1924, defendant filed an amended income and profits tax return, from which it appeared that defendant's net taxable income for said year was $200,846.72 and the tax due thereon $63,304.47, of which $1644.39 had been paid, indicating an underpayment of $61,660.08. Said underpayment of tax was neither assessed by the Commissioner of Internal Revenue nor paid by the defendant. On January 22, 1927, after an examination and audit

of defendant's returns for said year and the filing of a waiver by the defendant of its right to appeal to the Board of Tax Appeals and its consenting to the assessment of the deficiency, the Commissioner of [3] Internal Revenue made an additional assessment of tax against the defendant in the sum of $86,577.19 together with interest in the sum of $3,676.56.

VII.

On March 7, 1922, defendant filed its income and profits tax return for the year 1921, from which it appeared that its net taxable income for said year was $143,072.68 and the tax due thereon $56,470.53, which tax was paid to the Collector of Internal Revenue for the First District of California as follows:

March 7, 1922	$14,117.63
June 15, 1922	14,117.63
September 15, 1922	14,117.63
December 14, 1922	14,117.64

On August 4, 1926, the Commissioner of Internal Revenue, after an examination and audit of defendant's 1921 return, allowed an overassessment in favor of the defendant in the sum of $14,256.56. Of said amount $5,076.32 was credited against the additional assessment of tax against the defendant for the year 1917 in said amount, $9,180.24 was refunded with interest on said amount in the sum of $200,750.00, computed as follows: Interest on $9,041.32 from December 14, 1922, the date of over-

payment, to August 4, 1926, the date of the allowance of the refund, and on $138.92 from September 15, 1922, the date of the overpayment, to August 4, 1926, the date of the allowance of the refund.

VIII.

On November 10, 1926, the Commissioner of Internal Revenue notified the defendant that an audit of its income tax returns for the years 1917 to 1920, inclusive, had resulted in the determination of a deficiency in tax of $86,577.19 for the year 1920 and an aggregate overassessment of $22,025.93 for the years 1917, 1918 and 1919. Defendant was also notified that it was granted thirty days from the date of the letter within which to protest the proposed deficiency in tax. [4]

IX.

On December 31, 1926, the Commissioner of Internal Revenue, in a letter, notified the defendant of the above determination of deficiency and overassessments and allowed the defendant sixty days within which to file a petition with the Board of Tax Appeals for a redetermination of the deficiency. A copy of said letter is hereto attached, marked "Exhibit 1" and made a part hereof.

X.

The defendant acquiesced in the determination of the Commissioner of Internal Revenue relative to the deficiency in tax of $86,577.19 for the year 1920 by the filing of a waiver of its right to file a

petition with the United States Board of Tax Appeals and consenting to the assessment and collection of the deficiency in tax aggregating $86,-577.19, a copy of which is hereto attached, marked "Exhibit 2" and made a part hereof.

XI.

On January 31, 1927, the Commissioner of Internal Revenue allowed and scheduled to the Collector of Internal Revenue the following overassessments in favor of the defendant:

1917	$4,976.77
1918	9,860.54
1919	7,188.62

Of the overassessment of $4976.77, the entire amount was erroneously refunded together with interest in the sum of $146.51 computed on said amount from August 4, 1926, to January 31, 1927. On June 15, 1927, further interest was allowed and paid on said overassessment in the sum of $1,086.70 computed from December 14, 1922, to January 31, 1927.

The entire amount of the overassessment of $9,-860.54 for the year 1918 was erroneously refunded together with interest thereon in the sum of $3,-416.47 computed from April 22, 1921, the date of the overpayment, to January 31, 1927, the date of the allowance of the refund. [5]

Of the overassessment of $7188.62 for the year 1919, $5253.75 was credited: $1577.19 against the balance of defendant's underpayment for the year

1920 and $3676.56 against interest due the United States from the defendant on its underpayment of tax; and $1934.87 was erroneously refunded with interest in the sum of $670.39 computed from April 22, 1921, to January 31, 1927.

XII.

On February 10, 1927, the Collector of Internal Revenue for the First District of California applied as a credit against the additional assessment of $86,577.19 the sum of $85,000.00 paid to the Collector of Internal Revenue for said district in advance of the additional assessment by the Commissioner of Internal Revenue on January 22, 1927.

XIII.

On February 17, 1928, the Commissioner of Internal Revenue allowed an overassessment in favor of the defendant for the year 1920 in the sum of $7490.84; the amount of said overassessment was arrived at as follows:

	Tax	Interest
Total previously assessed	$88,221.58	$3,676.56
Total tax liability	76,829.78	3,192.80
Overassessment indicated	$11,391.80	$ 483.76
Total tax and interest		$11,875.56
Less: Amount withheld for adjustment in connection with suit for recovery of an erroneous allowance of interest for the years 1917, 1918 and 1919		4,384.72
Net overassessment		$ 7,490.84

The entire amount of said net overassessment was refunded to the defendant with interest in the sum of $458.06 computed from February 10, 1927, the date of the overpayment, to February 17, 1928, the date of the allowance of the refund. [6]

XIV.

Plaintiff alleges that the amounts of interest in the sums of $146.51, $3416.47 and $670.39 for the years 1917, 1918 and 1919, respectively, and the further allowance of $1086.70 for the year 1917 constituted an over-allowance of interest and an erroneous and illegal refund of money to the defendant to the extent of $4384.72 for the reason that the entire overassessments on which said interest allowances were computed should have been credited against the additional assessment against the defendant for the year 1920; that no interest

is allowable under Section 1116 of the Revenue Act of 1926 on the overassessments thus credited for the reason that the due date of the tax to which the credits were applied, March 15, 1921, is prior to the date of the payment of the taxes overassessed; that the amount of the erroneous refund of interest is arrived at as follows:

Additional tax for the year 1920		$86,157.19
Less overassessments:		
1917	$4,976.77	
1918	9,860.54	
1919	7,188.62	22,025.93
Balance on which interest should have been assessed		$74,131.26
Interest thereon		$ 2,741.21
Interest assessed		3,676.56
Interest erroneously assessed		$ 935.35
Interest erroneously refunded		5,320.07
Amount of interest to be recovered		$ 4,384.72

XV.

On April 7, 1927, the Commissioner of Internal Revenue, after further examination and audit of defendant's 1921 return, allowed a further overassessment in the sum of $603.07 with interest thereon in the sum of $165.11 computed from September 15, 1922, the date of payment, to April 7, 1927, the date of allowance. [7]

XVI.

Plaintiff alleges that the Commissioner of Internal Revenue made an error in the computation of defendant's tax for the year 1921 by which defendant was allowed an overassessment of $14,256.56 and a further overassessment of $603.07; that said error resulted in an erroneous and illegal refund to the defendant in the sum of $1446.99; that a computation showing the manner in which the erroneous refund is determined is attached hereto, marked plaintiff's "Exhibit 3" and by reference made a part hereof.

XVII.

Plaintiff alleges that at the time of the making of the additional assessments of taxes against the defendant for the several years above referred to, the several assessments were made within the statutory pereiod of limitation as extended by waivers duly filed and executed between the defendant and the Commissioner of Internal Revenue.

XVIII.

Defendant alleges that prior to the commencement of this action the Collector of Internal Revenue for and on behalf of the plaintiff demanded of the defendant that it pay the sums of $4384.72 and $1446.99 erroneously refunded and paid by the plaintiff to the defendant; that the defendant neglected and refused to pay the same.

XIX.

The defendant, because of the erroneous refunds and illegal refunds made by the plaintiff to the defendant, as hereinbefore set forth, is indebted to the plaintiff in the sums of $4384.72 and $1446.99.

XX.

The Commissioner of Internal Revenue and the Attorney General authorize the commencement of this suit.

WHEREFORE plaintiff demands judgment against the defendant for the sums of $4384.72 and $1446.99 together with interest and the costs of this action.

GEO. J. HATFIELD,
United States Attorney. [8]

"EXHIBIT 1."

Form NP-2.

Treasury Department
Washington

IT:E:SM December 31, 1926.
HHV-C-30438-60D
Pacific Midway Oil Company,
822 Mills Building,
San Francisco, California.

Sirs:

An audit of your income and profits tax returns for the years 1917, 1918, 1919 and 1920 has resulted in the determination of a deficiency in tax of $86,577.19 for 1920 and overassessments aggregating

$22,025.93 for the years 1917, 1918 and 1919, as set forth in the attached statement.

In accordance with the provisions of Section 274 of the Revenue Act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the inclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:E:SM-60D-HHV-C-30438. In the event that you acquiesce in a part of the determination, the

waiver should be executed with respect to the items to which you agree.

Respectfully,
D. H. BLAIR,
Commissioner.
By (signed) C. R. NASH,
Assistant to the Commissioner.

Inclosures:
Statement.
Form A. [9]

Statement

December 31, 1926

IT:E:SM-60D
HHV-C-30438

In re: Pacific Midway Oil Company,
822 Mills Building,
San Francisco, California.

Year	Deficiency	Overassessment
1917		$ 4,976.77
1918		9,860.54
1919		7,188.62
1920	$86,577.19	
Totals	$86,577.19	$22,025.93
Net deficiency		$64,551.26

The details disclosing the above deficiency and overassessments were disclosed in Bureau letter dated November 10, 1926.

A copy of this letter has been furnished your authorized representative, Mr. William E. Hayes, Munsey Building, Washington, D. C. [10]

"EXHIBIT 2."

In re: Pacific Midway Oil Company,
822 Mills Building,
San Francisco, California.

IT:E:SM:60D FORM A
HHV-C-30438

WAIVER OF RIGHT TO FILE A PETITION WITH THE U. S. BOARD OF TAX APPEALS.

The undersigned taxpayer hereby waives the right to file a petition with the U. S. Board of Tax Appeals under Section 274 (a) of the Revenue Act of 1926 and consents to the assessment and collection of a deficiency in tax for the year 1920 aggregating $86,577.19.

PACIFIC MIDWAY OIL CO.
(Name)

San Francisco, Calif.
(Address)

(Corporate seal to be affixed;
if no seal, so state.)

By (Signed) B. S. NOYES,
President.

Date January 24, 1927.

NOTE: This waiver does not extend the statute of limitations for refund or assessment of tax, and is not an agreement as provided under Section 1106 of the Revenue Act of 1926. [11]

"EXHIBIT 3."

1921

Net income reported	$143,072.68
Deduct:	
1. Depletion allowed	25,543.25
Net income adjusted	$117,529.43

Explanation of Change

1. Depletion has been allowed, based on the March 1, 1913 value and reserves which were established in conference held October 18, 1923. Article 201, Regulations 62.

Production	Rate	Depletion
92,384 barrels	.27649	$25,543.25

Invested Capital

Capital stock and surplus as at December 31, 1919, as adjusted in accordance with audit approved for 1920 and prior years, $210,681.29

Add:	
1. 1920 adjusted taxable income	227,496.10
2. 1920 nontaxable income	3,612.56
3. Realized appreciation	111,963.14
Total	$553,753.09

Deduct:			
4.	Dividends paid 1920	$98,133.50	
5.	Income tax due, 1917	196.39	
	1918	206.20	
	1919	291.96	
6.	Income tax 1920 $76,829.78 prorated	32,468.27	
7.	Dividends paid 1921 in excess of earnings	220,189.85	351,486.17
Invested capital adjusted			$202,266.92

Computation of Tax

Net income adjusted	$117,529.43
Invested capital adjusted	$202,266.92
Excess profits credit (8% of $202,266.92 plus $3,000.00)	19,181.35

[12]

Capital	Income	Credit	Balance	Rate	Tax
20%	$40,453.38	$19,181.35	$21,272.03	20%	$ 4,254.41
Balance	77,076.05		77,076.05	40%	30,830.42
Totals	$117,529.43	$19,181.35	$98,348.08		$35,084.83

Net income			$117,529.43
Less:			
Interest not exempt	$2,714.05		
Profits tax	35,084.83	37,798.88	
Balance taxablee at 10%		$79,730.55	7,973.06
Total tax liability			$43,057.89
Tax previously assessed		$65,470.53	
Less:			
Overassessment allowed	$14,256.56		
Overassessment allowed	603.07	14,859.63	41,610.90
Amount due, representing erroneous allowance and refund			$1,446.99

[Endorsed]: Filed Dec. 26, 1928. [13]

[Title of Court and Cause.]

DEMURRER.

Defendant demurs to plaintiff's complaint on file herein on the following grounds:

I.

That said complaint does not state a cause of action;

II.

That said complaint is ambiguous for the following reasons:

(a) That in paragraph XIII thereof plaintiff admits having received from defendant the sum of Four Thousand Three Hundred Eighty-four and 72/100 Dollars ($4,384.72), and in paragraph XVIII thereof alleges that defendant is indebted to the plaintiff in said sum, and in the prayer thereof prays judgment therefor.

(b) That in paragraph VII thereof it is alleged that Nine Thousand One Hundred Eighty and 24/100 Dollars ($9,180.24) was refunded with interest on said amount in the sum of Two Hundred Thousand Seven Hundred and Fifty Dollars ($200,750.00).

III.

That said complaint is uncertain for the same reasons that it is ambiguous as set forth in paragraph II hereof: [14]

IV.

That said complaint is unintelligible for the same reasons that it is ambiguous as set forth in paragraph II hereof.

WHEREFORE, defendant prays that plaintiff take nothing by this action and that defendant be hence dismissed with costs of suit incurred herein.

MELVIN & SULLIVAN,
Attorneys for Defendant.

I hereby certify that the foregoing demurrer is not interposed for purposes of delay but in my opinion is well taken in point of law.

WM. J. DE MARTINI,
One of the Attorneys for Defendant.

Receipt of a copy of the within Demurrer is hereby admitted this 7th day of February, 1929.

GEO. J. HATFIELD,
Attorney for Plaintiff.

[Endorsed]: Filed Feb. 7, 1929. [15]

District Court of the United States, Northern District of California, Southern Division.

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 25th day of February, in the year of our Lord one thousand nine hundred and twenty-nine.

Present: the Honorable FRANK H. KERRIGAN, District Judge.

[Title of Cause.]

ORDER OVERRULING DEMURRER.

Ordered that the motion for an order and decree that plaintiff deposit with the clerk $4,384.72, being the subject matter of suit, after argument by attorneys for the respective parties, be and the same is hereby denied. Further ordered that the demurrer herein, be and the same is hereby overruled, with leave to answer within ten days. [16]

[Title of Court and Cause.]

STIPULATION WAIVING JURY.

IT IS HEREBY STIPULATED by and between the parties hereto that a jury may be and the same is hereby waived and that the above matter shall be tried by Court without a jury.

Dated, April 27, 1929.

GEO. J. HATFIELD,
Attorney for Plaintiff.
MELVIN & SULLIVAN,
Attorneys for Defendant.

[Endorsed]: Filed Apr. 27, 1929. [17]

[Title of Court and Cause.]

ANSWER.

Defendant herein answering plaintiff's complaint on file herein admits, denies and alleges as follows:

I.

Answering paragraph XI of plaintiff's complaint defendant denies that the entire or any amount of the overassessment of $4,976.77 or any sum with interest in the sum of $146.51 or any interest was erroneously refunded; denies that on June 15, 1927 or at any time further or any interest was allowed and/or paid on said overassessment in the sum of $1,086.70 or any sum; denies that the entire or any amount of the overassessment of $9,860.54 or any

sum for the year 1918 with interest thereon in the sum of $3,416.47 or any interest was erroneously refunded; denies that $1,934.87 or any sum with interest in the sum of $670.39 or any interest was erroneously refunded.

II.

Answering paragraph XII of plaintiff's complaint defendant alleges that it has not sufficient information or belief with which to answer the allegations of said paragraph and basing its denial on said ground denies each and every, all and singular, the allegations contained therein. Further answering paragraph XII defendant alleges that on November 10, 1926 defendant herein paid to the Collector of Internal Revenue for the First District of California, the sum of $85,000.00 to be applied as credit against any deficiency in taxes that might be found by the Commissioner of Internal Revenue.

III.

Answering paragraph XIII of plaintiff's complaint defendant alleges that it has not sufficient information or belief with which to answer the allegations of said paragraph and basing its denial on said ground denies each and every, all and singular, the allegations contained therein.

IV.

Answering paragraph XIV defendant denies that amounts of interest in the sums of $146.51, $3,416.47

and $670.39 or any interest and/or a further allowance of $1,086.70 or any allowance or any sum constituted an over-allowance of interest and/or an erroneous and/or illegal refund of money to defendant to the extent of $4,384.72 or any sum, and denies that there was any erroneous refund of interest.

V.

Answering paragraph XVI defendant denies that the Commissioner of Internal Revenue made an error in the computation of defendant's tax for the year 1921 or any year; denies that the alleged error resulted in an erroneous and/or illegal refund to the defendant in the sum of $1,446.99 or any sum; denies that the computation incorporated in plaintiff's complaint and known as Exhibit 3 is a correct computation and on this behalf alleges that it was erroneous.

VI.

Answering paragraph XVII defendant denies that the several assessments mentioned in plaintiff's complaint were made within the statutory period of limitation.

VII.

Answering paragraph XVIII defendant denies that prior to the commencement of this action or at any time the Collector of Internal Revenue or anyone for and/or on behalf of the plaintiff demanded of defendant that it pay the sums of $4,384.72

and/or $1,446.99 or any sum and denies that the defendant neglected and/or refused to pay the same.

VIII.

Answering paragraph XIX defendant denies that it is indebted to plaintiff or anyone in the sums of $4,384.72 and/or $1,446.99 or any sum.

WHEREFORE, defendant prays that plaintiff take nothing by its complaint.

MELVIN & SULLIVAN,
Attorneys for Defendant.

State of California,
City and County of San Francisco.—ss.

E. S. Noyes, being first duly sworn, deposes and says:

That he is an officer, to-wit: President of the defendant corporation, and that he makes this verification for and on behalf of said corporation and that he has read the foregoing answer and knows the contents thereof and the same is true of his own knowledge except as to those matters therein stated on information and belief, and as to those matters, he believes it to be true.

B. S. NOYES.

Subscribed and sworn to before me this 10th day of April, 1929.

[Seal] HALLIE L. LANFAR,
Notary Public in and for the City and County of San Francisco, State of California.

Service of the within answer by copy admitted this 10 day of Apr. 1929.

GEO. J. HATFIELD,
Attorney for.....

[Endorsed]: Filed Apr. 10, 1929.

United States of America
Northern District of California.—ss.

CERTIFICATION.

I, WALTER B. MALING, Clerk of the United States District Court in and for the Northern District of California, do hereby certify that the annexed and foregoing is a true and full copy of the original Answer, filed April 10, 1929 in the case entitled The United States vs. Pacific Midway Oil Company, No. 18306-K, now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at San Francisco, Calif., this 20th day of May, A. D. 1932.

[Seal] WALTER B. MALING,
Clerk.
By LYLE S. MORRIS,
Deputy Clerk.

[Title of Court and Cause.]

AMENDED ANSWER AND COUNTERCLAIM.

Comes now the defendant in the above entitled action, and by leave had and obtained, makes and files its Amended Answer and Counterclaim to the Complaint in the above entitled action, and admits, denies and alleges as follows:

I.

Admits the allegations of paragraph I of the complaint.

II.

Admits the allegations of paragraph II of the complaint.

III.

Admits the allegations of paragraph III of the complaint.

IV.

Admits the allegations of paragraph IV of the complaint.

V.

Admits the allegations of paragraph V of the complaint.

VI.

In answer to paragraph VI of the complaint the defendant admits all the plaintiff's allegations therein, except the allegation relating to an additional assessment of $86,577.19 alleged to have been made on January 22, 1927, and the allegation relating to

an underpayment of $61,660.08, as to which allegations the defendant does not have sufficient knowledge or information upon which to form a belief, and, therefore, denies the same.

VII.

Answering paragraph VII of the complaint, the defendant admits all allegations contained therein, except the allegation that interest in the sum of $200,750 was paid to the defendant on a refund of $9,180.24, which allegation [18] the defendant denies.

VIII.

Answering paragraph VIII of the complaint, the defendant admits that the Commissioner of Internal Revenue, on November 10, 1926, in Washington, D. C., addressed a letter to the defendant at San Francisco, California, advising that an audit of its income tax returns for the years 1917 to 1920, inclusive, disclosed an additional tax of $86,577.19 for the year 1920 and overassessments aggregating $22,025.93 for the years 1917, 1918 and 1919; but plaintiff denies such letter constituted a determination of a deficiency for 1920, or that it received the letter prior to November 17, 1926.

IX.

Admits the allegations of paragraph IX of the complaint.

X.

Answering paragraph X of the complaint, the defendant admits the signing of the waiver therein

referred to, but denies that it acquiesced in the determination of the Commissioner of Internal Revenue, and further denies that on January 24, 1927, or at any time subsequent to November 10, 1926, there was any deficiency for the year 1920.

XI.

Answering paragraph XI of the complaint, the defendant admits that overassessments were allowed and scheduled on the date and in the amounts alleged for the years 1917, 1918 and 1919; admits that the overassessment for 1917 was refunded with interest as alleged, but denies that such refund of tax or interest was erroneous; admits that the overassessment for 1918 was refunded with interest as alleged, but denies that such refund of tax or interest was erroneous; admits that $1,577.19 of the overassessment for 1919 was credited against an alleged underpayment of taxes for 1920, that $3,676.56 [19] of the 1919 overassessment was credited against interest alleged to be due for 1920, and that the balance of the 1919 overassessment was refunded with interest as alleged, but denies that there was any underpayment of tax or interest for 1920 at the time these alleged credits were made, and further denies that the refund of the balance of overassessment and interest was erroneous.

XII.

Answering paragraph XII of the complaint, the defendant alleges that it has not sufficient information on which to form a belief, and on that ground

denies each and every allegation contained therein. Further answering paragraph XII, the defendant alleges that on November 10, 1926, the defendant paid to the Collector of Internal Revenue for the First District of California the sum of $85,000.00 on account of taxes for the year 1920, which payment made a total payment of $86,644.39 for the year 1920, an amount which was at least $9,814.61 in excess of the defendant's total tax liability for the year 1920.

XIII.

Answering paragraph XIII of the complaint, the defendant admits that the Commissioner of Internal Revenue determined that the total tax liability of the defendant for the year 1920 was $76,829.78, and that the defendant had overpaid its taxes for that year in the amount of $11,391.80, and that it had paid excess interest in the sum of $483.76 on its 1920 taxes. The defendant further admits that the defendant thereafter received from the plaintiff, on account of the aforesaid overassessment of $11,-875.56 tax and interest, the sum of $7,490.84 together with interest thereon in the sum of $458.06. The defendant further admits that the plaintiff withheld from the amount of said overassessment of [20] tax and interest the sum of $4,384.72.

XIV.

Answering paragraph XIV of the complaint, the defendant denies that any allowance of interest as alleged was erroneous or illegal or that it consti-

tuted an overallowance of interest as alleged, and denies that there was any erroneous refund of interest. Further answering paragraph XIV defendant denies that on January 31, 1927, the date on which the Commissioner of Internal Revenue allowed the overassessments for the years 1917, 1918 and 1919, there was outstanding any unpaid tax for the year 1920.

XV.

Admits the allegations of paragraph XV of the complaint.

XVI.

Answering paragraph XVI of the complaint, the defendant denies that the Commissioner of Internal Revenue made an error in the computation of defendant's tax for the year 1921 or any year. The defendant further denies that the computation incorporated in plaintiff's complaint as Exhibit 3 is a correct computation, and on this behalf alleges that it is erroneous.

XVII.

Answering paragraph XVII of the complaint, defendant denies that the several assessments mentioned in plaintiff's complaint were made within the statutory period of limitation.

XVIII.

Answering paragraph XVIII of the complaint, defendant alleges that the defendant does not have sufficient knowledge or information upon which to

form a belief and, therefore, denies the allegations contained therein.

XIX.

Answering paragraph XIX of the complaint, defendant [21] denies that it is indebted to plaintiff as alleged.

For further answer to the said complaint by way of counterclaim the defendant alleges:

I.

In adjusting the 1919 overassessment of $7,188.62 the Commissioner of Internal Revenue credited $3,676.56 of this amount against interest alleged to be due the United States for the year 1920. No interest was allowed or paid to the defendant on the amount thus credited. The defendant is entitled to interest at the rate of six per centum per annum on the $3,676.56 from the date the amount was paid on April 23, 1921, to January 31, 1927, amounting to $1,274.00. The plaintiff has refused to allow or pay such interest, notwithstanding demand therefor has been made by the defendant.

II.

On February 17, 1928, the Commissioner of Internal Revenue, acting on a claim for refund duly filed by the defendant, determined that defendant had overpaid its income and profits taxes for the year 1920 in the sum of $11,391.80, and had paid excess interest for 1920 in the sum of $483.76. An overassessment in the amount of $11,875.56 was allowed on that date.

III.

On February 17, 1928, there was no income, war-profits or excess profits tax or installment thereof then due from the defendant.

IV.

On or about February 17, 1928, the Commissioner of Internal Revenue refunded to the defendant, from the 1920 overassessment of tax and interest determined as set out above, the sum of $7,490.84 with interest thereon in the sum of [22] $458.06. The balance of the overassessment of tax and interest, amounting to $4,384.72, was withheld from the defendant by the Commissioner in satisfaction of interest alleged to have been erroneously paid to the defendant and which is sued for in this action.

V.

The Commissioner of Internal Revenue made an error in the computation of interest due the defendant on the amount of $7,490.84 refunded to the defendant on February 17, 1928. The correct amount of interest is $543.32 and the defendant is entitled to a further payment of interest in the sum of $85.26. The plaintiff has refused to pay the defendant any additional interest on this refund, notwithstanding demand therefor has been made by the defendant.

VI.

The action of the Commissioner of Internal Revenue in withholding the sum of $4,384.72 from

the defendant was erroneous and illegal. The defendant is entitled to refund of this sum with interest as provided by law from November 10, 1926. The plaintiff has refused to refund to the defendant the amount withheld, notwithstanding demand therefor has been made by the defendant.

WHEREFORE, the defendant prays that the plaintiff take nothing by this action, and that judgment be entered for the defendant for the sums of $1,274.00, $85.26 and $4,384.72 with interest thereon as provided by law, and its costs of this action.

JOSEPH D. BRADY,
Counsel for Defendant.

c/o Brewster & Ivins, 1369 Russ Building, San Francisco, California.

BREWSTER & IVINS,
815 Fifteenth St., N. W., Washington, D. C.
Of Counsel.

Service admitted, GEO. J. HATFIELD, by ESTHER B. PHILLIPS, Jan. 19, 1931.

[Endorsed]: Filed Jan. 19, 1931. [23]

[Title of Court and Cause.]

MEMORANDUM OPINION.

Before KERRIGAN, District Judge.

GEORGE J. HATFIELD, United States District Attorney and MISS ESTHER B. PHILLIPS, Assistant United States Attorney, Counsel for Plaintiff.

JOSEPH D. BRADY and F. E. YOUNGMAN, of San Francisco, California, Counsel for Defendant.

Two of the matters disputed in this case have been eliminated from consideration by concessions of the Government: it has abandoned its contention that there was an illegal refund on the overassessment of the defendant's tax for 1921; it has conceded that a credit of $85.26 should be allowed defendant upon the computation of interest upon its 1920 deficiency.

The sole question then is: should the Collector of Internal Revenue have credited the overpayments of the defendant's taxes for 1917, 1918 and 1919 against its deficiency of $86,557.19 for the year 1920 which would have necessitated a refusal to refund the overpayments with interest? The Government's contention that he should have done so appears to be supported by the authorities construing the sections of the law on set-off of overpayments against deficiencies and on the allowance of interest upon deficiencies and overpayments. [24]

The only difficulty in this case arises from the fact that the sum of $85,000 was paid by the defendant to the Collector upon November 10, 1926 to be applied upon its 1920 deficiency. This was the same day that notice was mailed from Washington to defendant advising it of the respective overpayments and the deficiency. Subsequently this sum was applied to the deficiency leaving a balance of $1,577.19 with interest on the deficiency from February 26, 1926, amounting to $3,676.56. The total of these amounts was considered by the Collector to be the amount of tax "then due" under the terms of the section on set-off (Revenue Act of 1926, Sec. 284a) and was the only sum deducted from the overpayments to be refunded. As a result the balance of the overpayments with interest thereon from the respective dates of overpayment was paid to the taxpayer; the payment of this interest was improper. Had the Collector not applied the payment of $85,000 to the deficiency, he would have set off the full amount of the overpayments against the deficiency, leaving a balance of $64,-531.26 with interest payable from February 26, 1926 under the terms of Sec. 283d of the Revenue Act of 1926.

The authorities hold that there shall be no refund of overpayments to the taxpayers unless there is a net balance in favor of the taxpayer on the theory that "any other interpretation would permit the taxpayers * * * to exact from the government interest when the net balance was against him."

McCarl vs. Leland, 42 Fed. 2nd. 346; Tull and Gibbs vs. U. S. (C. C. A. 9) 48 Fed. 2nd. 148. This rule was applied in the McCarl case where the determination of the deficiency was pending on appeal and in the Tull and Gibbs case where the amounts of the deficiencies had not been ascertained but where it was known that there were deficiencies. The courts have given weight to the fact that the statutes require the [25] government to pay interest on overpayments from the date they were made while it can only collect interest on deficiencies from February, 1926. Two cases consider the effect of a tender of the deficiency. In Lucas vs. Blackstone, 45 Fed. 2nd. 291, it was held that a tender was properly refused by the Commissioner when there had been overpayments by the taxpayer even though the overpayments had not been scheduled until after the tender. The case of York Safe & Lock Co. vs. U. S., 40 Fed. 2nd. 148, expressly leaves open the situation where, as in this case, the payment was made after notice of the determination of the deficiency but before the determination became final. It is immaterial that the notice was not actually received until after the tender. Evidently the taxpayer had a representative in Washington who was keeping it advised of the progress of its matters pending before the Commissioner and who did advise the taxpayer of the fact of the determination the day the notice was sent out. It seems to be the rule that if the payment of the deficiency is made under such circumstances that the Court believes

it was made to defeat the government's right to set-off overpayments against deficiencies and thus require the payment of interest upon overpayments, such payment should be applied only to the *net balance of the deficiency.* The government is therefore entitled to the interest improperly paid. Since this money is now in the hands of the government, having been withheld upon a subsequent adjustment of an overassessment, the government is only entitled to interest from the date of its payment to the taxpayer to the date of such subsequent adjustment.

According to the suggestion in Parker vs. St. Sure decided by the Circuit Court of Appeals for the Ninth Circuit on October 26, 1931 (see Supplement to Manual of Federal Appellate Procedure by Paul P. O'Brien, pp. 5 and 6) this opin- [26] ion is adopted by me as my findings of fact and conclusions of law. In order that the defendant's record on appeal may be further protected, defendant's motion for special findings is denied; exception noted.

Let judgment be entered in accordance with the principles stated in this opinion in favor of the United States with costs.

Dated this 31st day of December, 1931.

KERRIGAN,
District Judge.

[Endorsed]: Filed Dec. 31, 1931. W. B. Maling, Clerk. By Lyle S. Morris, Deputy. [27]

In the Southern Division of the United States District Court for the Northern District of California.

No. 18,306-K.

THE UNITED STATES,

Plaintiff,

vs.

PACIFIC MIDWAY OIL COMPANY, a corporation,

Defendant.

JUDGMENT.

This cause having come on regularly for trial on the 19th day of January, 1931, before the Court sitting without a jury, a jury having been waived by written stipulation filed; Esther B. Phillips, Assistant United States Attorney, appearing as attorney for plaintiff, and Joseph D. Brady, Esquire, appearing as attorney for defendant and the trial having been proceeded with and oral and documentary evidence on behalf of the respective parties having been introduced, and the cause having been submitted to the Court for consideration and decision; and the Court, after due deliberation, having rendered his decision, and ordered that judgment be entered in accordance therewith as hereinafter set forth.

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is hereby ordered, adjudged and decreed by the Court that

plaintiff do have and recover of and from the defendant the sum of $3495.28 without interest and its costs herein expended as may be taxed.

Dated, San Francisco, California, January 28th, 1932.

FRANK H. KERRIGAN,
United States District Judge.

[Endorsed]: Filed and entered Jan'y 28, 1932. [28]

[Title of Court and Cause.]

ENGROSSED BILL OF EXCEPTIONS.

BE IT REMEMBERED that on the 19th day of January, 1931, the above-entitled cause came on for trial before the Court sitting without a jury, a jury having been waived by stipulation, between the parties, and thereafter the following proceedings took place:

GEORGE J. HATFIELD, Esq., United States Attorney for the Northern District of California, and Miss ESTHER PHILLIPS, Assistant United States Attorney for said District, appearing for the plaintiff, and JOSEPH D. BRADY, Esq., appearing for the defendant.

Thereupon an opening statement was made in behalf of the plaintiff and an opening statement was made in behalf of defendant.

Miss PHILLIPS. I would like to offer in evidence a certified copy of the assessment list dated

January 22, 1927, which contains the assessment of the tax for the year 1920.

Mr. BRADY. No objection to that.

(The document, being a duly certified copy of "Commissioner's Assessment List," dated January 22, 1927, showing an assessment for the year 1920 of $86,577.19 tax and $3676.56 interest, was received in evidence and marked Plaintiff's Exhibit "1".) [29]

Miss PHILLIPS.—I would like to offer in evidence the certificate of overassessment showing the allowance made on account of interest for the years 1917, 1918, 1919, 1920 and 1921 and ask that they be marked U. S. Exhibits 2, 3, 4, and 5 respectively.

Mr. BRADY.—No objection to that.

(These documents, which are described hereafter, were received in evidence and marked Plaintiff's Exhibits 2, 3, 4, and 5, respectively.)

Exhibit "2," being a duly certified copy of a "Certificate of Overassessment" issued by the Commissioner of Internal Revenue with an attached copy of a letter dated June 1, 1927, directed to the Pacific Midway Oil Company, signed, C. R. Nash, Assistant to Commissioner of Internal Revenue, showing an allowance of interest on account of an overassessment of tax for the year 1917 in the amounts of $146.51 and $1,086.70.

Exhibit "3," being a duly certified copy of a "Certificate of Overassessment" issued by the Commissioner of Internal Revenue, showing an allow-

ance of interest on account of an overassessment of tax for the year 1918 in the amount of $3,416.47.

Exhibit "4," being a duly certified copy of a "Certificate of Overassessment" issued by the Commissioner of Internal Revenue, showing an allowance of interest on account of an overassessment of tax for the year 1919 in the amount of $670.39.

Exhibit "5," being a duly certified copy of a letter, dated December 31, 1926, directed to the Pacific Midway Oil Company, signed, D. H. Blair, Commissioner of Internal Revenue, stating that a determination of tax liability had been made for the years 1917 to 1920, inclusive, and that an appeal therefrom to the United States Board of Tax Appeals might be filed within sixty days from the date of the letter. The following tabulation sets forth a summary of the determination: [30]

	Deficiency	Overassessment
1917	$	4,976.77
1918		9,860.54
1919		7,188.62
1920	86,577.19	

Net deficiency $64,551.26.)

Miss PHILLIPS.—I offer in evidence the certificate of overassessment and letter dated, January 16, 1928.

(These documents, being duly certified copies of a "Certificate of Overassessment" issued by the Commissioner of Internal Revenue, showing an

overassessment of tax liability and interest for the year 1920 in the amount of $11,875.56, with a notation that $4,384.72, thereof, was "Amount withheld for adjustment in connection with suit for recovery of an erroneous allowance of Interest for the years 1917, 1918, and 1919," and that the balance of $7,490.84 was refunded with interest in the amount of $458.06, and a letter dated January 16, 1928, directed to the Pacific Midway Oil Company, signed by the Commissioner of Internal Revenue, notifying the company that its claim for refund for the year 1920 had been allowed in the manner set forth heretofore in describing the certificate of overassessment for the year 1920, were received in evidence and marked Plaintiff's Exhibit "6.")

Miss PHILLIPS.—I would like to offer a certified copy of the record of the Collector of Internal Revenue, showing the schedule of overassessment for the years 1917, 1918, 1919 and 1920.

(The document, being a certified copy of the record of the Collector of Internal Revenue, showing the schedule of overassessments for the years 1917, 1918, 1919 and 1920, was received in evidence and marked Plaintiff's Exhibit "7.")

TESTIMONY OF WILLIAM M. WALSH FOR PLAINTIFF.

WILLIAM M. WALSH, called as a witness for the plaintiff, [31] being first duly sworn, testified:

I am Deputy Collector of Internal Revenue. I have been such for ten years in the income tax

branch. I have with me the files showing the interest and refunds and overassessments for the Pacific Midway Oil Company for the years 1917 to 1920, inclusive. I have a tabulation of these, prepared in my office under my supervision. The Pacific Midway Oil Company tendered a check in the amount of $85,000 in November, 1926, in advance of the Commissioner's final assessment of the deficiency tax for 1920. A suspense account is where money is held prior to allocating it to a certain account. If a payment of tax is tendered in advance of an assessment by the Commissioner, it is accepted, but it cannot be applied against any assessment. The check is immediately put in the bank and marked suspense account. The assessment against the Pacific Midway Oil Company for 1920 was received from the Commissioner, February 10, 1927. When the assessment was received, the payment of $85,000 was then applied against it.

CROSS-EXAMINATION.

The records show that the check for $85,000 was received on November 10, 1926, and the practice is to cash checks the same day. I recognize the collector's endorsement on the check that you show me, purporting to be a check of the Pacific Midway Oil Company, dated November 9, 1926, to the order of the Collector of Internal Revenue, San Francisco, California, in the amount of $85,000. I would say the check cleared through the bank so that the Collector of Internal Revenue received credit for

it on November 12, 1926. My records show that the check was received on account of 1920 tax liability and ultimately applied to the 1920 tax liability. My records do not show that this check was rejected or returned to the defendant. [32]

Mr. BRADY.—I hand you a paper and ask you if you recognize it?

A. Yes.

Q. Describe it.

A. It is a form of receipt for the payment of $85,000 on account of additional income tax for the year 1920.

Mr. BRADY.—If your Honor please, the defendant offers this receipt in evidence.

Miss PHILLIPS.—No objection.

(The document, being an acknowledgment by the Collector of Internal Revenue of the payment of $85,000 by the Pacific Midway Oil Company to apply on its tax liability for the year 1920 and bearing the Collector's stamp of payment dated, November 10, 1926, was received in evidence and marked Defendant's Exhibit "A".)

Mr. BRADY.—I would like to put in some proof with respect to the allegations of the counter-claim unless Miss Phillips is prepared to admit the allegations of facts.

Miss PHILLIPS. I have not had time to go into that counter-claim. If you have your proof I suggest you put it in.

Mr. BRADY.—It is only as to one question of fact. In paragraph one of our counter-claim we

make this allegation, "In adjusting the 1919 overassessment of $7,188.62 the Commissioner of Internal Revenue credited $3,606.56 of this amount against interest alleged to be due the United States for the year 1920. No interest was allowed or paid to the defendant on the amount thus credited." Now if this is a fact and Miss Phillips is prepared to admit it, we won't have to adduce any proof.

Miss PHILLIPS.—I would say that whatever allowances of interest were made by the Commissioner are shown by the exhibits that I put in evidence.

The COURT.—Do you wish to introduce in evidence that [33] summary.

Miss PHILLIPS.—Yes.

(The document being a summary prepared from the records of the Collector of Internal Revenue setting out the overassessments for the years 1917, 1918, 1919 and 1920, was received in evidence and marked Plaintiff's Exhibit "8.")

The COURT.—Let the record show this, before you introduced any evidence or attempted to introduce any evidence in your case that you moved for nonsuit.

Mr. BRADY.—We move for judgment for the defendant on the complaint and for judgment for the defendant on the counter-claim.

Miss PHILLIPS.—I move for judgment for plaintiff as prayed for in the complaint, and for judgment in favor of the plaintiff as against the

defendant's counter-claim, and ask for special findings.

Mr. BRADY.—Defendant moves for judgment for defendant on the complaint and for the defendant on the allegations of the counter-claim.

The COURT.—On the ground that the evidence is not sufficient to sustain a judgment in favor of the plaintiff. You have to state the grounds.

Mr. BRADY.—We move for judgment because the evidence is not sufficient to sustain a verdict in favor of the plaintiff, on the ground that the allegations of the plaintiff's complaint under the law applicable thereto, show that the plaintiff is not entitled to judgment, and further show that the defendant is entitled to judgment, and furthermore, the allegations of the plaintiff's complaint show under the law applicable thereto, that the defendant is entitled to judgment on the counter-claim.

The following stipulation in writing, signed by the par- [34] ties to this action, was filed February 25, 1931:

"STIPULATION FOR INTRODUCTION OF EVIDENCE.

It is hereby stipulated and agreed that a waiver of time for making assessment of income, excess profits, or war profits taxes for the year 1920 as hereto attached, was made and filed, and that said waiver may be considered as introduced into evidence upon the trial of the above entitled case."

INCOME AND PROFITS TAX WAIVER.

For taxable years prior to January 31, 1922.

In pursuance of the provisions of existing Internal Revenue Laws, Pacific Midway Oil Co., a taxpayer of San Francisco, Calif., and the Commissioner of Internal Revenue, hereby waive the time prescribed by law for making any assessment of the amount of income, excess profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year (years) 1920 under existing revenue acts, or under prior revenue acts.

This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1926, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board. [35]

PACIFIC MIDWAY OIL CO.,

Taxpayer.

(signed) B. S. Noyes, President.

(signed) D. H. Blair, Commissioner.

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of

the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed."

The foregoing is a copy of the duly certified "Income and Profits Tax Waiver" attached to the stipulation.

Thereafter and on December 31, 1931, the court filed a "Memorandum Opinion" finding generally for the plaintiff and denying defendant's motion for special findings, and exception noted.

After the memorandum opinion was filed, the parties entered into the following stipulation:

"STIPULATION UPON COMPUTATION OF JUDGMENT.

It is hereby STIPULATED and AGREED that if the judgment herein is computed upon the principles enunciated by the court in his memorandum opinion rendered herein on December 31, 1931, the correct amount is $3495.28.

It is FURTHER AGREED that the defendant by agreeing to this computation is not to be understood as stipulating to acceptance of the principles approved by the court.

Dated, January 29, 1932."

On January 28, 1932, judgment was entered in favor of plaintiff in the agreed sum of $3495.28, with costs but without interest.

Defendant hereby excepts to the order of the court [36] denying defendant's request for special findings.

Defendant hereby excepts to the order of the court for judgment in favor of plaintiff and judgment in favor of plaintiff and against defendant on plaintiff's complaint.

Defendant hereby excepts to the order of the court for judgment in favor of plaintiff and against defendant on defendant's counter-claim.

The defendant, the Pacific Midway Oil Company, presents the foregoing as and for its bill of exceptions in the above-entitled cause and prays that the same may be settled, allowed, signed and filed as such.

O. R. FOLSOM-JONES,
WM. BRESNAHAN,
Attorneys for Defendant. [37]

ORDER APPROVING AND SETTLING BILL OF EXCEPTIONS.

The foregoing bill of exceptions is duly proposed and is correct in all respects, and is hereby approved, allowed and settled and made a part of the record herein and said bill of exceptions may be used by either party, plaintiff or defendant, upon any appeal taken by either party, plaintiff or defendant.

Dated, May 13, 1932.

FRANK H. KERRIGAN,
United States District Judge.

IT IS STIPULATED that the foregoing bill of exceptions is true and correct and that the same may be settled and allowed by the court.

O. R. FOLSOM-JONES,
WM. BRESNAHAN,
Attorneys for Defendant.
GEO. J. HATFIELD,
United States Attorney.
ESTHER B. PHILLIPS,
Assistant United States Attorney,
Attorneys for Plaintiff.

[Endorsed]: Filed May 13, 1932. [38]

[Title of Court and Cause.]

STIPULATION REGARDING BILL OF EXCEPTIONS AND EXHIBITS.

IT IS HEREBY STIPULATED by and between the plaintiff and defendant in the above entitled cause, and by their respective counsel, that the original exhibits, numbers 1 to 8, inclusive, of plaintiff, and Exhibit A for defendant, may be transmitted to the Clerk of the United States Circuit Court of Appeals for the Ninth District for use in connection with the appeal in this cause, now pending.

IT IS FURTHER STIPULATED AND AGREED that for the purpose of settling, signing and filing the bill of exceptions in the said case, the said exhibits need not be included in the said bill of exceptions but will be deemed to be incorporated therein.

Dated, May 5, 1932.

O. R. FOLSOM-JONES,
WM. BRESNAHAN,
Attorneys for Defendant.
GEO. J. HATFIELD,
ESTHER B. PHILLIPS.

Approved: May 7, 1932.
FRANK H. KERRIGAN,
District Judge.

[Endorsed]: Filed May 7, 1932. [39]

[Title of Court and Cause.]

PETITION FOR APPEAL AND ASSIGNMENT OF ERRORS.

To the United States District Court for the Northern District of California, Southern Division:

The Pacific Midway Oil Company, a corporation, defendant and counterclaimant in the above entitled action, by and through O. R. Folsom-Jones and William Bresnahan, its attorneys, feeling itself aggrieved by the judgment entered heretofore to wit, on the 28th day of January, 1932, in the above entitled

action, does hereby appeal from said judgment and from the whole thereof to the United States Circuit Court of Appeals for the Ninth Circuit, and prays that its appeal may be allowed and that a transcript of the record of proceeding upon which said judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

And in connection with its petition for appeal herein and the allowance of same, said defendant assigns the following errors which it avers occurred at the trial of said cause and which were duly excepted to by it and upon which it relies to reverse the judgment in favor of the United States on its complaint and the defendant's counter-claim and seeks judgment [40] against the United States and in favor of the defendant on its counter-claim herein, to wit:

I.

That the court erred in making and entering judgment in favor of the plaintiff and against the defendant herein on its complaint and further erred in making and entering judgment in favor of the United States and against the defendant on the defendant's counter-claim upon each and all of the following grounds, to wit:

(a) On the ground that the evidence in the cause was such that the United States, the plaintiff, had not established any right of recovery against the defendant on plaintiff's complaint herein and

was insufficient as a matter of law to sustain a judgment in favor of plaintiff.

(b) On the ground that the evidence in the cause was such as a matter of law to entitle defendant to judgment against the plaintiff for the amount prayed for in its counter-claim and on all of the issues in the case.

(c) On the ground that the judgment was against the evidence.

(d) On the ground that the judgment was contrary to law.

II.

The court erred in denying defendant's motion for judgment in favor of defendant and against plaintiff on plaintiff's complaint at the close of all the evidence in the cause upon each and all of the following grounds, to wit:

(a) On the ground that the evidence in the cause was such that the United States, the plaintiff, had not established any right of recovery against the defendant on plaintiff's complaint herein and was insufficient as a matter of law [41] to sustain a judgment in favor of plaintiff.

(b) On the ground that the evidence in the cause was such as a matter of law to entitle defendant to judgment against the plaintiff on its complaint and for the amount prayed for in defendant's counter-claim and on all of the issues in the case.

III.

The court erred in overruling defendant's demurrer to the complaint upon each and all of the following grounds, to wit:

(a) The complaint failed to state a sufficient or any cause of action against the defendant.

(b) It affirmatively appeared from the allegations of the complaint that the plaintiff was not entitled to recover anything from the defendant by reason of the matters therein set forth and alleged.

(c) It affirmatively appeared from the complaint that prior to the commencement of the action, plaintiff had received from and been paid by the defendant the entire sum of money for which plaintiff prayed judgment against defendant in said action and that no money remained unpaid to plaintiff by reason of the matters set forth and alleged in said complaint.

IV.

The court erred in denying defendant's motion for judgment in favor of defendant and against plaintiff on plaintiff's complaint at the close of all the evidence in the cause upon each and all of the following additional grounds, to wit:

(a) It appeared from the pleadings and evidence without contradiction that the sum of $4384.72, said amount being the sum claimed by plaintiff from defendant in its complaint, was with-

held by the plaintiff from the amount of taxes the Commissioner of Internal Revenue determined to have been [42] overpaid by the defendant for the taxable year 1920; that the United States attempted to justify the withholding of said sum by asserting that there had been an excessive and erroneous overpayment of interest to defendant in the sum of $4384.72 on refunds of taxes made for the years 1917, 1918 and 1919 and that said refunds should have been credited to an alleged underpayment in the tax liability of the defendant for the year 1920 without payment of any interest whatsoever.

(b) It further appeared from the pleadings and evidence without contradiction that the alleged tax liability of the defendant and interest incidental thereto for the taxable year 1920 was the sum of $80,022.58 and no more; that there had been paid by the defendant on account of said tax liability and interest the sum of $1644.39 on March 15, 1921 and the further sum of $85,000.00 on November 10, 1926; that the refunds for the years 1917, 1918 and 1919, as aforesaid, were allowed by said Commissioner of Internal Revenue on January 31, 1927 and that as of said date of said allowance there existed no underpayment in the tax liability of the defendant for the year 1920 or any other year against which said refunds or any part thereof could have been credited.

(c) It further appeared from the pleadings and evidence that the action of the plaintiff and its Commissioner of Internal Revenue was illegal.

V.

The Court erred in denying defendant's motion for judgment in favor of defendant and against plaintiff on defendant's counter-claim at the close of all the evidence in the cause upon each and all of the following grounds, to wit:

(a) On the ground that the evidence in the cause was such that the United States, the plaintiff, had not estab- [43] lished any defense to defendant's counter-claim and was insufficient as a matter of law to sustain a judgment in favor of the United States and against the defendant.

(b) On the ground that the evidence in the cause was such as a matter of law to entitle defendant to judgment against the plaintiff for the amount prayed for in its counter-claim and on all the issues in the case.

VI.

The court erred in denying defendant's motion for judgment in favor of defendant and against plaintiff on defendant's counter-claim at the close of all the evidence in the cause upon each and all of the following additional grounds, to wit:

(a) Defendant incorporates herein by reference and makes a part hereof, subdivisions (a) and (b) of Paragraph IV hereof, hereinbefore set forth.

(b) It further appeared from the pleadings and evidence that the sum of $3676.56 representing part of an overpayment of taxes for the taxable year

1919 allowed by the Commissioner of Internal Revenue on January 31, 1927, was applied by said Commissioner as a credit against interest alleged to be due from the defendant in the sum of $3676.56 and assessed as a part of an alleged deficiency in tax for the year 1920, said deficiency having been assessed January 31, 1931.

(c) It further appeared that the tax assessed to defendant for the year 1919 concerning which the said Commissioner allowed said overpayment was originally paid on April 23, 1921, by defendant; that said overpayment remained overpaid from said date, April 23, 1921, to the date of said credit, to wit, January 31, 1927; that for the period of time between April 23, 1921, and January 31, 1927, the plaintiff failed to allow, pay or credit to the defendant any interest incidental to said overpay- [44] ment in the sum of $3676.56 as required by law.

(d) It further appeared from the evidence that the action of the plaintiff and its Commissioner of Internal Revenue in not allowing defendant interest at the rate of six per centum per annum on said sum for the period April 23, 1921, to January 31, 1927, was illegal.

VI.

The Court erred in refusing to make specific findings of the facts involved in this cause upon the ground that such findings were required to be made under the provisions of Section 764 of Title 28 of The United States Code.

WHEREFORE, defendant prays that its appeal be allowed, that a transcript of the proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, that this assignment of errors be made a part of the record in the cause, and that upon hearing of its appeal the errors complained of be corrected and the said judgment of January 28, 1932, may be reversed, annulled and held for naught; and further that it may be adjudged and decreed that said defendant and appellant have the relief prayed for in its counterclaim and such other relief as may be proper in the premises.

O. R. FOLSOM-JONES,
WM. BRESNAHAN,
Attorneys for Defendant and Appellant.

[Endorsed]: Filed Apr. 21, 1932. [45]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

Upon reading the petition for appeal of the defendant and appellant herein and on motion of William Bresnahan, one of the counsel for defendant,

IT IS HEREBY ORDERED that an appeal to the Circuit Court of Appeals for the Ninth Circuit from the judgment hereto filed and entered herein be and the same is hereby allowed and that a certified transcript of the record, testimony, bill of

exceptions, exhibits, stipulations and all proceedings be forthwith transmitted to the said Circuit Court of Appeals for the Ninth Circuit.

IT IS FURTHER ORDERED that the bond on appeal be fixed at the sum of $250.00, the same to act as a supersedeas bond and also as a bond for costs and damages on appeal.

Dated, April 21st, 1932.

FRANK H. KERRIGAN,
United States District Judge.

[Endorsed]: Filed Apr. 22, 1932. [46]

[Title of Court and Cause.]

UNDERTAKING FOR COSTS ON APPEAL.

WHEREAS, PACIFIC MIDWAY OIL COMPANY has appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a certain judgment rendered against said Pacific Midway Oil Company in said action in the above entitled Court and in favor of the United States of America, and entered herein on January 28, 1932.

NOW, THEREFORE, in consideration of the premises and of such appeal, the undersigned HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation organized and existing under the laws of the State of Connecticut and duly authorized to transact a general surety business in the State of California, does hereby undertake and

promise on the part of Pacific Midway Oil Company, the appellants, that said appellants will pay all damages and costs which may be awarded against them on the appeal, or on a dismissal thereof, not exceeding two hundred fifty dollars ($250.00), to which amount it acknowledges itself bound.

It is further stipulated as a part of the foregoing bond that in case of the breach of any condition thereof, the [47] above named District Court, may upon ten (10) days notice to the surety above named, proceed summarily in said proceedings to ascertain the amount which said surety is bound to pay on account of such breach, and render judgment therefor against said surety and award execution therefor, not exceeding, however, the said sum of two hundred fifty dollars ($250.00).

IN WITNESS WHEREOF, the said surety has caused these presents to be executed and its official seal attached by its duly authorized attorney-in-fact at San Francisco, California, the 20 day of April, A. D. 1932.

[Seal] HARTFORD ACCIDENT AND INDEMNITY COMPANY,
By DONALD MOLLBERG,
Attorney-in-Fact.

The premium on this bond is $10.00 per annum.

State of California,
City and County of San Francisco,—ss.

On this 20 day of April in the year one thousand nine hundred and thirty-two, before me, Vincent P. Laguens, a Notary Public in and for said City and County, residing therein, duly commissioned and sworn, personally appeared Donald Mollberg known to me to be the attorney-in-fact of the Hartford Accident and Indemnity Company, the Corporation described in and that executed the within instrument, and also known to me to be the person who executed it on behalf of the Corporation therein named, and he acknowledged to me that such Corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office, in the said City and County of San Francisco, the day and year in this certificate first above written.

[Seal] VINCENT R. LAGUENS,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission will expire July 30, 1935.

Approved this .....day of ....., 19.....
FRANK H. KERRIGAN,
Judge of District Court.

[Endorsed]: Filed Apr. 22, 1932. [48]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of said Court:

Sir: Please prepare and transmit to the Circuit Court of Appeals for the Ninth Circuit transcript of the record in the above-entitled cause for use on defendant's appeal herein and include therein the following:

1. Complaint.
2. Demurrer to complaint.
3. Order overruling demurrer.
4. Stipulation waiving jury.
5. Amended answer, and counter-claim.
6. Memorandum opinion.
7. Judgment.
8. Bill of exceptions and order settling same.
9. Petition for appeal and assignment of errors.
10. Stipulation regarding bill of exceptions and exhibits.
11. Order allowing appeal and fixing bond.
12. This praecipe.
13. Bond on appeal.

O. R. FOLSOM-JONES,
WM. BRESNAHAN,
Attorneys for Defendant.

Due Service admitted May 12, 1932.
ESTHER B. PHILLIPS,
Ass't U. S. Attorney.

[Endorsed]: Filed May 13, 1932. [49]

[Title of Court and Cause.]

CERTIFICATE OF CLERK UNITED STATES DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing 49 pages, numbered from 1 to 49, inclusive, to be a full, true and correct copy of the record and proceedings as enumerated in the praecipe for record on appeal, as the same remain on file and of record in the above entitled suit, in the office of the Clerk of said Court, and that the same constitutes the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is $10.10; that the said amount was paid by the defendant and appellant, and that the original citation issued in said suit is hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 18th day of May, A. D. 1932.

[Seal] WALTER B. MALING,
By B. E. O'HARA,
Deputy Clerk, United States District Court for the Northern District of California. [50]

CITATION.

United States of America,—ss.

The President of the United States of America, to THE UNITED STATES OF AMERICA, and to GEORGE J. HATFIELD, United States Attorney for the Northern District of California, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's office of the United States District Court for the Northern District of California, Southern Division, wherein Pacific Midway Oil Company, a corporation, is defendant and appellant, and you are appellee, to show cause, if any there be, why the decree or judgment rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable FRANK H. KERRIGAN, United States District Judge for the Northern District of California, this 21st day of April, A. D. 1932.

FRANK H. KERRIGAN,
United States District Judge. [51]

Service of the within citation on appeal is hereby accepted this 22d day of April, 1932.

GEO. J. HATFIELD,
Attorney for Plaintiff.

[Endorsed]: Filed Apr. 22, 1932. Walter B. Maling, Clerk. By B. E. O'Hara, Deputy Clerk.

[Title of Court and Cause.]

ORDER REGARDING ORIGINAL EXHIBITS.

Upon stipulation of counsel in the above entitled cause for the omission of the original exhibits introduced at the trial of said cause from the printed record,

IT IS ORDERED that all said exhibits may be deemed to be included in the bill of exceptions and may be omitted from the printed record on appeal.

Dated, May 19, 1932.

CURTIS D. WILBUR,
United States Circuit Judge.

STIPULATION AS TO ORIGINAL EXHIBITS.

IT IS HEREBY STIPULATED and AGREED between counsel for the respective parties that all original exhibits introduced at the trial of above-entitled cause may be deemed to be included in the bill of exceptions and may be omitted from the printed record on appeal.

Dated, May 19, 1932.

O. R. FOLSOM-JONES,
WM. BRESNAHAN,
Counsel for Defendant.
GEO. J. HATFIELD,
United States Attorney,
By ESTHER B. PHILLIPS,
Assistant United States Attorney,
Counsel for Plaintiff.

[Endorsed]: Filed May 20, 1932.

[Endorsed]: No. 6849. United States Circuit Court of Appeals for the Ninth Circuit. Pacific Midway Oil Company, a Corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed May 18, 1932.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6849

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PACIFIC MIDWAY OIL COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT.

WILLIAM BRESNAHAN,
200 Bush Street, San Francisco, California,
Attorney for Appellant.

BREWSTER, IVINS & PHILLIPS,
805-15th Street, N. W., Washington, D. C.,
Of Counsel.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 6849

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PACIFIC MIDWAY OIL COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT.

STATEMENT OF CASE.

This is an action brought by the Government to recover from appellant interest in the amount of $4,384.72 paid incidental to the refund of income taxes for 1917, 1918 and 1919. There was also a count for recovery of an alleged erroneous refund of taxes for 1921 but this has been abandoned.

The appellant denied any liability for the amounts sued for and in addition counterclaimed for an amount in excess of the Government's claim.

The District Court granted judgment for appellee in the amount of $3,495.28 (R. 38) and denied appellant's counterclaim. This appeal was taken from the judgment in favor of appellee and the denial of the counterclaim.

THE FACTS.

On March 15, 1921, the appellant filed its income tax return for 1920 and paid on that date the tax of $1,644.39 shown thereon to be due. On November 10, 1926 it paid to the Collector of Internal Revenue an additional amount of $85,000.00 on account of its 1920 tax liability. The Collector accepted this payment and immediately cashed the check.

On December 31, 1926, the Commissioner of Internal Revenue issued a notice of deficiency as required by Section 274 (a) of the Revenue Act of 1926 indicating an underassessment of tax for 1920 of $86,577.19. This amount was assessed against the appellant on January 22, 1927 plus interest of $3,676.56.

On January 31, 1927, the Commissioner allowed overassessments of tax for the years 1917, 1918 and 1919 aggregating $22,025.93 and forwarded a schedule of them to the Collector for ascertainment as to whether there were any taxes of the appellant then due to which these amounts should be credited. The Collector upon searching his records found only $1,577.19 ($86,577.19 additional assessment less $85,000.00 payment) tax and $3,676.56 interest for the year 1920 remaining unpaid on the appellant's account and after applying a sufficient portion of the overassessments to offset these amounts, certified the balance back to the Commissioner as refundable. The Commissioner, in April, 1927, refunded to appellant the balance with interest.

Thereafter on February 17, 1928, the Commissioner allowed a refund of tax for 1920 of $11,875.56 but

instead of refunding the entire amount, he withheld $4,348.72 with the explanation that it was retained on account of the prior erroneous allowance of interest on the refunds for 1917, 1918 and 1919.

The Government then brought this suit presumably to justify the withholding of this money but actually praying for an affirmative judgment for a like amount.

ISSUES INVOLVED.

The complaint fails to state a cause of action.

The principal issue presented is whether the Commissioner of Internal Revenue acted contrary to law in refunding certain admitted overpayments of taxes with interest.

The judgment as entered is improper in that it grants judgment to appellee for money it admittedly already has and fails to grant judgment to appellant for the excess of money held by appellee over that allowed by District Court's decision.

If this court finds that original action of Commissioner was according to law then appellant is entitled to interest on that part of the 1919 overassessment credited against the interest assessed on the 1920 deficiency.

BRIEF OF ARGUMENT.

I. Suit was brought to recover an amount which is being withheld by appellee. Under such circumstances the appellee is without a cause of action.

II-III. The court below held that the action of the Commissioner in refunding certain overpayments with interest was illegal. The Commissioner's acts are presumed to be lawful and the burden of proving the contrary has not been sustained. The effect of the court's decision is to deny taxpayers the right to voluntarily pay taxes in advance of assessment in order to avoid the accumulation of interest and in its efforts to find a reciprocal arrangement for the payment and collection of interest on refunds and additional assessments the court improperly interpreted the law.

IV. An overpayment of taxes for 1919 made in 1921 and allowed as an overpayment in 1927 was applied against interest assessed in 1927 on a 1920 deficiency. The interest assessed did not become due until assessed in 1927 and the Commissioner was in error in failing to allow interest on the 1919 overpayment from 1921 until the assessment of interest in 1927.

V. Regardless of how this court may view the other issues, the appellant is entitled to an affirmative judgment for that part of the overpayment allowed for 1920 which is being withheld by the Government in excess of the amount held recoverable by the lower court. The Government concedes it is withholding $4,384.72 from appellant. The court below gave judgment for $3,495.28. In order to insure appellant that it will be able to recover the difference admittedly due it, the judgment should be directed in favor of appellant for $889.44. Otherwise if the Government fails to return this amount the appellant would be

without recourse to enforce payment in event the defense of *res adjudicata* is interposed.

ARGUMENT.

I. THERE IS NO CAUSE OF ACTION SHOWN.

The Government concedes that it allowed an overpayment of taxes and interest for 1920 of $11,875.56 but refunded only $7,490.84 withholding $4,384.72 to satisfy its alleged claim for prior erroneous refund of interest which is the basis of this action and for which it seeks judgment.

Manifestly the claim of the Government was satisfied before the action commenced and there remains no redress that could be extended to it by this court. Its suit is without merit and should have been dismissed.

II. THE COMMISSIONER COMMITTED NO ERROR IN ORIGINALLY REFUNDING OVERPAYMENTS WITH INTEREST.

a. Acts of Commissioner are presumed to be in accordance with the law.

The Commissioner allowed certain overassessments and after applying part of them as a credit, refunded the balance with interest. Subsequently the Government decided that this action of the Commissioner was erroneous and now seeks the recovery of the interest refunded. Just why recovery of only the interest is sought although the pleadings allege the entire action of the Commissioner to have been er-

roneous appears to be an inconsistency upon which the record casts no light.

When the Commissioner made the refunds that the Government now alleges to have been erroneous, he is presumed to have acted in accordance with the law[1]. The Government, as plaintiff, had the burden of proving the Commissioner acted contrary to law. Not only did it fail to meet this burden, but the pleadings and evidence sustain the legality of the Commissioner's action.

b. Refunds were made in accordance with the law.

Section 284 (a) of the Revenue Act of 1926, which is the governing statute, provides that:

> "Where there has been an overpayment of any income, war-profits or excess-profits tax * * * the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof *then due* from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer."

In this case the Commissioner's determination that overpayments existed was made January 31, 1927. In pursuance of the provisions of Section 284, he forwarded a schedule of the overassessments to the Collector for the purpose of noting thereon any other taxes of the taxpayer "then due." The Collector reported back that there remained unpaid only $1,577.19 tax and $3,676.56 interest. Overassessments to this

1. *Trustees of Ohio & Big Sandy Oil Co. v. Commissioner*, 9 B. T. A. 617, 625-626, and cases cited; *Pantages Theater Co. v. Lucas*, 42 Fed. (2d) 810, 812; *United Thatcher Coal Co. v. Commissioner*, 46 Fed. (2d) 231, 233; *Washington Post Co. v. Commissioner*, 10 B. T. A. 1077, 1080; *Griffen v. American Gold Mining Co.*, 136 Fed. 69; *Gonzales v. Ross*, 120 U. S. 605, 616.

extent were applied as a credit and the balance was refunded to the taxpayer with interest.

Assuming these facts to be correctly stated, it is obvious that the action of the Commissioner was proper and there is no justification for holding it to have been erroneous. And there can be no question of the accuracy of these facts as they are taken from the Government's complaint. (R. 7.)

c. Payment of $85,000.00 on November 10, 1926 was a valid payment of 1920 taxes.

Paragraph XIV of the complaint (R. 9) appears to contain the only explanation of the Government's basis for recovery in the allegation that the overassessments should have been credited against the additional assessment for 1920. This is interesting but somewhat confusing as there is found nowhere in the Revenue Act of 1926 any authority or direction for applying overassessments against additional assessments.

Apparently the Government intends to argue that the payment of $85,000.00 on account of 1920 taxes on November 10, 1926 should be disregarded. Such a contention would amount to denying a taxpayer the right to pay his taxes at any time after they became due.

A taxpayer's liability to pay the tax on his income becomes fixed at the close of the taxable year[2]. The tax becomes due and payable under the statute at the

2. *Fawcus Machine Co. v. United States*, 282 U. S. 375; *United States v. Yale & Towne Mfg. Co.*, 269 U. S. 422; *United States v. Woodward*, 256 U. S. 632.

time the return is filed[3]. The full amount of tax on the appellant's income for 1920 became due and payable on March 15, 1921, when its return was filed, regardless of the fact that the return indicated a much smaller amount than the tax actually due. The appellant was at all times thereafter under legal obligation to pay its 1920 tax.

Furthermore the appellant had a legal right to pay its tax at any time, whether or not any steps were taken by the Commissioner to collect it by assessment or otherwise. Assessment is not a necessary prerequisite to collection of a tax[4]. Nor have we been able to find any authority to the effect that assessment is a necessary prerequisite to voluntary payment by a taxpayer. While not directly in issue, the Court of Claims in *Royal Bank of Canada v. United States,* 70 Ct. Cl. 663, 44 Fed. (2d) 249, expressly recognizes the right of a taxpayer to make payment prior to assessment, and allows recovery of interest from the date of such payment.

By payment of $85,000.00 on November 10, 1926, upon account of 1920 income taxes, the appellant sat-

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3. In the case of taxes for 1920 imposed by the Revenue Act of 1918, see section 250(a), (b), (e), and Regulations 45, Arts. 1001, 1003. For the due date under later Revenue Acts see section 250 of the Revenue Act of 1921 and Art. 1001 of Regulations 62, section 270 of the Revenue Acts of 1924 and 1926 and Art. 1201 of Regulations 65 and 69. section 56 of the Revenue Acts of 1928 and 1932 and Art. 431 of Regulations 74.

4. *Dollar Savings Bank v. United States,* 19 Wall. 227; *United States v. Ayer,* 12 Fed. (2d) 194; *United States v. Kelley,* 24 Fed. (2d) 234, rev. on other ground, 30 Fed. (2d) 193; *United States v. Greenfield Tap & Die Corp.,* 27 Fed. (2d) 933; *United States v. Cruikshank, et al.,* 48 Fed. (2d) 352; Regs. 45, Art. 1008, applicable to 1920. Since enactment of the Revenue Act of 1926 a statutory notice of deficiency must be mailed under section 274(a) before proceeding for collection can be begun. But this provision still does not make formal assessment a prerequisite to collection. *O'Cedar Corporation v. Reinicke,* not yet published, decided July 26, 1932, by the District Court, Eastern District of Illinois, C. C. H., Standard Federal Tax Service, Par. 9434.

isfied to that extent its legal obligation to the Government. The Collector accepted the payment as a payment of 1920 taxes and issued a receipt so stating. (R. 44.) Neither the Collector nor the Commissioner could have treated this payment as a payment on account of taxes for any other year. Neither could they disregard this payment in the collection of further taxes for 1920.

And further the record shows conclusively that this payment was not disregarded. Throughout the entire interest computations including those upon which this action is based the Government computes interest charges taking into consideration this payment as made on November 10, 1926. And we are aware of no effort ever having been made to return it to the appellant which would seem to have been the plausible disposition of it if the Government decided it was not acceptable.

There appears to be no basis for disregarding this payment and if it is not disregarded we find that even upon the theory of applying overassessments against additional assessments there is no ground for holding in favor of the Government. On January 22, 1927, the Government made an additional assessment for 1920 of $86,577.19, with interest of $3,676.56. On November 10, 1926, nearly three months prior, the taxpayer had paid up $85,000.00 of that additional assessment. On January 31, 1927, the overassessments were allowed. Obviously on January 31, 1927, there only remained of the additional assessment the difference between the amount assessed and the amount paid up, and there was no way that the Commissioner could

in the face of these facts apply more of the overassessments than would absorb this difference. This he did and his action seems to have been proper.

d. Preliminary notice prior to assessment not a final determination.

From a reading of the appellee's reply brief filed in the lower court we gather another indication of the position that will probably be advanced by the Government. It states that the determination of the deficiency is alleged to have been made on November 10, 1926, in Paragraph VIII of the complaint and that this is admitted in the answer. The lower court was apparently somewhat influenced by this inadvertence of Government counsel, and I would like to call attention to this court that the amended answer contains no such admission.

The Commissioner made his "determination" on December 31, 1926. (R. 12-14, Exhibit No. 1.) Any correspondence which the appellant may have received prior to the letter of December 31, 1926, was not a "determination of a deficiency" within the meaning of Section 274 (a) of the Revenue Act of 1926.[5] Nor did any such correspondence amount to an "allowance" of the overassessments prior to the allowance of January 31, 1927. Any notice received from the Commissioner indicating that he found taxes overassessed prior to the actual allowance on January

5. *Appeal of Terminal Wine Co.*, 1 B. T. A. 697, 701; *Appeal of New York Trust Co., et al., Executors*, 2 B. T. A. 583, 586; *Miami Metals Co. v. Commissioner*, 10 B. T. A. 421, 426; *United States ex rel. Dascomb v. Board of Tax Appeals*, 16 Fed. (2d) 337.

31, 1927, was without legal effect.[6] The allowance of an overpayment is not made until the proper formal action is taken by the Commissioner in signing a schedule of refunds or credits.[7] It is only after the formal "allowance" of an overpayment that the taxpayer has a claim against the Government on which suit can be brought.

It is manifest from the record here that on November 10, 1926, there had been no official "determination" of a deficiency nor any "allowance" of overassessments. No action had been taken by the Commissioner that created a definite status between the Government and the taxpayer. His letter of November 10, was merely tentative in character and did not render the proposed deficiency "prima facie" due as would a statutory determination such as the letter of December 31, nor did it extend any rights to the taxpayer with regards to the overassessments upon which it might found a suit.

e. Decision of lower court.

Apparently the lower court considered the Commissioner's letter of November 10, 1926, as a final statu-

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6. The record does not show that the appellant had any such notice at the time the $85,000.00 payment was made. It could not have received the letter (not introduced in evidence) alleged to have been mailed from Washington, D. C.. on the same date, and the supposition indulged in by the court below that the appellant had a representative in Washington who kept it advised is entirely unsupported by any kind of evidence. In fact the record shows that the check was dated November 9, 1926, and presumably was drawn on that date. (R. 43.)

7. *Bonwit Teller & Co. v. United States*, 283 U. S. 258; *Western Shade Cloth Co. v. United States*, 58 Fed. (2d) 863 (Adv. Shts.). Also cf. following language in G. C. M. 8902, IX-2 C. B. 222, 223: "When it is determined that a tax is overpaid—that is, when the Commissioner approves the schedule of refunds and credits—the liability of the Government to refund or credit the amount so overpaid becomes fixed and determined, and the right of the taxpayer to such interest as is allowed by the statute likewise becomes fixed and determined."

tory notice of deficiency and an allowance of the over-assessments in arriving at its decision as only by so doing could it have considered the authorities cited to be controlling. Reference to these cases will show that there is a factual distinguishment with the case at bar in that in each the court is referring to a notice of deficiency as provided by law and not to such a preliminary notice as that of November 10, 1926.

In the *McCarl v. Leland*[8] case the Commissioner had sent a final deficiency letter notifying the taxpayer of a deficiency for one year and an overpayment for another. An appeal was taken to the Board of Tax Appeals and while it was pending the Commissioner authorized refund of the overpayment. The Comptroller General refused to certify the overpayment and the taxpayer petitioned for a writ of mandamus. The court held that although the deficiency could not be collected until the proceedings before the Board were concluded, yet the determination of the Commissioner was *prima facie* correct and the deficiency must be considered "then due." Under such circumstances the overpayment was not refundable under Section 284 (a) of the 1926 Act. The same principal was involved in *Tull & Gibbs, Inc., v. U. S.*[9] in that a refund was asked while an appeal was pending before the Board.

In the case here the appellant not only had not appealed to the Board on November 10, 1926, but no action of the Commissioner was taken prior to December 31, 1926, from which an appeal would lie.

8. 42 Fed. (2d) 346 Cert. den. 282 U. S. 839.
9. 48 Fed. (2d) 148.

In *York Safe and Lock Co. v. U. S.*,[10] a statutory letter of final determination was issued June 26, 1926, notifying of a deficiency and an overassessment. The taxpayer did not appeal within the 60 days allowed and after expiration of that period delivered to the Collector a check for the deficiency. It was held that the deficiency had become due and the overpayment should have been applied as a credit against it before applying the tendered payment.

However, the court stated in its opinion that a different conclusion would have been reached had the facts been similar to the facts of this case. The court said:

> * * * Had the plaintiff discovered the deficiency in tax for 1918 and paid it before the Commissioner made his determination and notified plaintiff on June 26, 1926, the entire overpayment for 1919 would have been refundable with interest.

This appellant discovered a deficiency in its 1920 tax as early as August 14, 1924 (R. 4), and paid it nearly two months before the notice of December 31, 1926, which notice is the one comparable with that of June 26, 1926.

The lower court further misconstrued the York case when it says that it expressly leaves open the question here. The question expressly left open in the *York* case was what the result would have been if the payment of the deficiency was made after the notice of June 26, but before the 60-day period for appeal had expired. In this case that question is not presented

10. 40 Fed. (2d) 148.

as the payment was made before the 60-day period had commenced.

Had the lower court noted the factual differences between the case at bar and the authorities referred to it, it is probable that its opinion would have been to the contrary.

III. INEQUALITY IN THE INTEREST PROVISIONS OF THE LAW IS NOT CONTROLLING.

If a proper application of the law works to the disadvantage of either party, it is to be regretted, but it is not the province of the courts to arbitrarily apply taxing statutes contrary to their express provision in order to effect a more equitable result in particular cases.

There are numerous instances of inequality in the payment and collection of interest which cannot be remedied by judicial interpretation. Probably the most glaring difference was created by the provisions of Section 319 of the Legislative Appropriation Act recently enacted (Public No. 212, 72d Cong., 1st Sess.), which allows interest on refunds at the rate of 4%, while the Government still collects interest on underpayments at the rate of 6% to the date of assessment, and at 12% if not paid within ten days after notice and demand.

The provisions of law are clear. Congress expressly provided that interest should be paid on refunds and collected upon unpaid taxes for certain periods. There is nothing reciprocal about those provisions and there

is no basis for any court to attempt to work out reciprocity on the ground of the intent of Congress.

IV. APPELLANT IS ENTITLED TO INTEREST ON THAT PART OF THE 1919 OVERPAYMENT WHICH WAS CREDITED IN PAYMENT OF 1920 INTEREST.

The Commissioner allowed an overpayment of $7188.62 for 1919. He credited $1577.19 against unpaid 1920 tax and $3676.56 against interest assessed on the 1920 deficiency and refunded the balance. No interest was allowed on the $3676.56 overpayment of *tax* credited against *interest* on the 1920 additional assessment. In its counterclaim the appellant asks for interest on this amount from the date its 1919 tax was paid, April 23, 1921, to the date of the credit. The appellant is entitled to this only in event this court finds that the overpayments were properly made in the first instance.

This question was disposed of in the affirmative in *Moore Shipbuilding Co. v. United States.*[11] In that case an overpayment of tax was credited against an *ad valorem* penalty instead of interest as in this case. But the principle is the same. The credits were both made under Section 1116 of the 1926 Act, which allows interest on credits to the due date of the amount against which an overpayment is credited. An interest assessment, like the penalty assessment, becomes due only when assessed.

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11. 50 Fed. (2d) 288.

Interest should be allowed on the $3676.56 from April 23, 1921, to January 31, 1927, the due date of the interest against which it was credited.

V. APPELLANT IS ENTITLED TO AFFIRMATIVE JUDGMENT FOR AMOUNTS DUE IT.

The Government is suing to recover an amount alleged to have been erroneously paid to appellant. Entirely independent of its claim for recovery, the Government admits that it is withholding from appellant the sum of $4384.72, which is legally due appellant as refund of taxes overpaid for another year.

The court below entered judgment for the Government for $3495.28 and failed to enter judgment for appellant for the $4384.72 admittedly due it. This was error.

If the decision of the court below is sustained in principle, its judgment should be modified to include judgment for appellant for $4384.72 on its counterclaim, or it should be modified to give judgment for the appellant for $889.44, the net amount still due it after allowing for the amount found to be due the Government.

In its present form, the Government can have execution on its judgment and recover from appellant the sum of $3495.28. The judgment is only an adjudication of the appellee's claim for interest, and not an adjudication of appellant's claim for money admittedly due it.

The right of the appellant to money due it is put in issue by its counterclaim. Unless it is given af-

firmative relief in this proceeding, it would be precluded by the doctrine of *res adjudicata* from proceeding in another action to recover from the Government. Unless given judgment for the amount due it, the appellant will be thrown upon the benevolence of the Commissioner of Internal Revenue.

CONCLUSION.

This case should be reversed and remanded to the District Court with directions to enter judgment against the appellee on all counts in its complaint, and to enter judgment for the appellant for the sum of $4384.72 illegally withheld from it by the Commissioner of Internal Revenue, plus $1274.00 interest on that portion of the 1919 tax credited against the 1920 interest assessment, and the further sum of $85.26 already conceded to be due the appellant, together with interest on such sums as provided by law, and such other relief as seems just.

Dated, San Francisco, California,
November 9, 1932.

Respectfully submitted,

WILLIAM BRESNAHAN,
Attorney for Appellant.

BREWSTER, IVINS & PHILLIPS,
Of Counsel.

No. C052

United States
Circuit Court of Appeals
For the Ninth Circuit.

CINEMA PATENTS COMPANY, INC., a corporation,
Appellant,

vs.

COLUMBIA PICTURES CORPORATION, a corporation, and WILLIAM HORSLEY FILM LABORATORIES, INC., a corporation,
Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Central Division.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

No.

United States
Circuit Court of Appeals
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CINEMA PATENTS COMPANY, INC., a corporation,
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INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italic; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

INDEX TO BOOK OF EXHIBITS.

Names and Addresses of Attorneys.

For Plaintiff and Appellant:

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Los Angeles, California.

For Defendants and Appellees:

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556 Subway Terminal Building,
Los Angeles, California.

CITATION

BY THE HONORABLE WILLIAM P. JAMES, ONE OF THE UNITED STATES DISTRICT JUDGES FOR THE SOUTHERN DISTRICT OF CALIFORNIA IN THE NINTH CIRCUIT.

TO COLUMBIA PICTURES CORPORATION AND WILLIAM HORSLEY FILM LABORATORIES, INC. GREETING:

YOU ARE HEREBY CITED and admonished to be and appear before a United States Circuit Court of Appeals for the Ninth Circuit to be holden in the City of San Francisco in the Circuit above named on the 27th day of April, 1932, pursuant to an Appeal filed in the Clerk's Office of the District Court of the United States for the Southern District of California, wherein Cinema Patents Company, Inc. is appellant, and you are appellees, to show cause, if any there be, why the Decree in said Appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

GIVEN UNDER MY HAND in the City of Los Angeles, in the Circuit above named, this 29 day of March, in the year of our Lord One Thousand Nine Hundred and Thirty-two and of the Independence of the United States the One Hundred and Fifty-sixth.

Wm P. James
United States District Judge for the Southern District of California in the Ninth Circuit.

[Endorsed]: Received copy of the within Citation this 30th day of March, 1932 Frank L A Graham Attorney for Defendants.

Filed Mar 30 1932 R. S. Zimmerman, Clerk By Theodore Hocke, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

CINEMA PATENTS COMPANY, INC., a corporation,	)	
Plaintiff,	)	
vs.	)	EQUITY NO. R-83-J
COLUMBIA PICTURES CORPORATION, a corporation, and WM. HORSLEY FILM LABORATORIES, INC., a corporation,	)	
Defendants	)	

BILL OF COMPLAINT FOR INFRINGEMENT OF PATENTS NO. 1,177,697 AND NO. 1,281,711

Now comes plaintiff above named, and complaining of the defendants above named, alleges as follows:

I.

That plaintiff, Cinema Patents Company, Inc. is a corporation duly organized and existing under and by virtue of the laws of the State of New York, and a citizen of that state, having its principal office and place of business in the City of New York, County of New York, and State of New York.

II.

That defendant Columbia Pictures Corporation is a corporation, duly organized and existing under and by virtue of the laws of the State of New York, and a citizen of that State, having an office and a regular and established place of business in the City of Los Angeles, County

of Los Angeles and State of California; that the defendant Wm. Horsley Film Laboratories, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of California, and a citizen of that state, having its office and principal place of business in the City of Los Angeles, County of Los Angeles and State of California.

III.

That this is a suit arising under the patent laws of the United States, and the court has jurisdiction thereunder.

IV.

That prior to the 17th day of February, 1909, Leon Gaumont, a citizen of the French Republic, and a resident of Paris, France, was the original, first and sole inventor of a certain new and useful method and apparatus for DEVELOPING, FIXING, TONING, AND OTHERWISE TREATING PHOTOGRAPHIC FILMS AND PRINTS, fully described in letters patent No. 1,177,697, hereinafter mentioned, which invention had not been known or used by others in this country before his invention thereof, and had not been patented or described in any printed publication in this or any other foreign country before his invention thereof, or for more than two years prior to his application for United States Letters Patent therefor, and not in public use or on sale in this country for more than two years prior to his said application for said United States Letters Patent, and not abandoned, and not first patented or caused to be patented by said inventor, or his legal representatives or assigns in any foreign country upon an application filed more than twelve months prior to the filing of his said application for patent in this country.

V.

That on the 17th day of February, 1909, the said Leon Gaumont, as the inventor of said invention, applied for letters patent of the United States thereon, and having complied with all the laws, rules and regulations of the United States, concerning such application, such proceedings were had, that on the 4th day of April, 1916, letters patent of, and in the name of the United States of America, for said invention, under seal of the Patent Office, signed by the Commissioner of Patents, in due form of law, and numbered 1,177,697, were issued to said Leon Gaumont, for said invention, whereby there was granted and secured to said Leon Gaumont, his successors or assigns, for seventeen years from the date of said patent, the exclusive right of making, using and vending to others to be used, the invention and improvements described in said letters patent.

VI.

That by instruments in writing dated respectively, November 22nd, 1926, January 3rd, 1929 and April 11th, 1930, duly executed and delivered and duly recorded in the United States Patent Office, the entire right, title and interest in the said invention and said patent, together with any and all claims and demands both in law and in equity for infringement of said letters patent, was assigned by the said Leon Gaumont to Famous Players Lasky Corporation, a corporation, organized and existing under and by virtue of the laws of the State of New York, and by said Famous Players Lasky Corporation to Spoor-Thompson Machine Company, a corporation organized and existing under and by virtue of the laws of the State of Illinois, the said Famous Players Lasky Corporation

having, between the time of acquiring title, and assigning title, as aforesaid, duly, and in accordance with the law, changed its name from Famous Players Lasky Corporation to Paramount Famous Lasky Corporation, and by said Spoor-Thompson Machine Company to Cinema Patents Company, Inc., plaintiff herein; and Cinema Patents Company, Inc., plaintiff, has been, ever since April 11th, 1930, and now is the owner of the entire right, title and interest in and to the said invention and said letters patent No. 1,177,697, and of any and all claims and demands, both in law and in equity for infringement of said letters patent.

VII.

That prior to September 15, 1915, Frederick B. Thompson, a citizen of the United States, and a then resident of Chicago, Illinois, was the original, first and sole inventor of a certain new and useful PHOTOGRAPHIC FILM TREATING APPARATUS, fully described in letters patent No. 1,281,711, hereinafter mentioned, which invention had not been known or used by others in this country before his invention thereof, and had not been patented or described in any printed publication in this or any other foreign country before his invention thereof, or for more than two years prior to his application for United States Letters Patent therefor, and not in public use or on sale in this country for more than two years prior to his said application for said United States letters patent and not first patented or caused to be patented by said inventor, or his legal representatives or assigns in any foreign country upon an application filed more than twelve months prior to the filing of his said application for patent in this country.

VIII.

That on the 15th day of September, 1915, the said Frederick B. Thompson, as the inventor of said invention, applied for letters patent of the United States thereon, and having complied with all the laws, rules and regulations of the United States, concerning such application, such proceedings were had, that on the 15th day of October, 1918 letters patent of, and in the name of the United States of America, for said invention, under seal of the Patent Office, signed by the Commissioner of Patents, in due form of law, and numbered 1,281,711 were issued to said Frederick B. Thompson, for said invention, whereby there was granted and secured to said Frederick B. Thompson, his successors or assigns, for seventeen years from the date of said patent, the exclusive right of making, using and vending to others to be used, the invention and improvements described in said letters patent.

IX.

That on or about the 10th day of December, 1928, by final consent decree, signed and entered in and by the United States District Court for the Southern District of California, Southern Division, in the cause of George K. Spoor and Spoor-Thompson Machine Company, a corporation, plaintiffs, vs. Frederick B. Thompson, et al, defendants, in Equity No. L-38, a certified copy of which decree was duly recorded in the United States Patent Office, it was ordered, adjudged and decreed that Spoor-Thompson Machine Co., an Illinois corporation was then the owner of the entire right, title and interest in and to said letters patent No. 1,281,711, and any and all claims and demands, both at law or in equity, for infringement of said letters patent; and by an instrument in writing,

dated December 20, 1928, duly executed and delivered, and duly recorded in the United States Patent Office, certain persons and corporations, to wit, Frederick B. Thompson, Grace Seine Thompson, C. C. Mangenheimer, Mangenheimer Securities Corporation, a corporation, H. T. James and Bennett Film Laboratories, a corporation, theretofore *theretofore* claiming rights to the said invention, and said patent therefor, to wit, No. 1,281,711, which rights were adjudicated and determined in the aforesaid action in equity, assigned to Spoor-Thompson Machine Co., an Illinois corporation, their and each of their right, title and interest, which they had, or claimed to have had in said invention, and said patent therefor, together with any and all claims and demands, both at law and in equity, for infringement of said letters patent; that by an instrument in writing, dated the 11th day of April, 1930, duly executed and delivered, and duly recorded in the United States Patent Office, the said Spoor-Thompson Machine Co., a corporation, assigned to Cinema Patents Company, Inc., plaintiff, the entire right, title and interest in and to said invention, and patent therefor, No. 1,281,711, together with any and all claims and demands, both in law and in equity, for infringement of said letters patent; and the Cinema Patents Company, Inc., plaintiff, has been, since the 11th day of April, 1930, and now is, the owner of the entire right, title and interest in and to said letters patent No. 1,281,711, and any and all claims and demands, both at law and in equity, for infringement of said letters patent.

X.

That the inventions patented in and by said letters patent No. 1,177,697 and No. 1,128,711 are capable of

conjoint use, and have been so used by the defendants, and each of them in infringement thereof.

XI.

That the inventions patented in and by said letters patent No. 1,177,697 and No. 1,281,711, and each of them, have been, and are, of great value and commercial utility, and the public in the United States of America and throughout the world, has generally recognized and acquiesced in the utility, value and patentability of said inventions, and each of them, and has recognized and acquiesced in the validity of said letters patents, and the exclusive rights of the plaintiff thereunder.

XII

That the defendants, and each of them, jointly and severally, or severally, as plaintiff is informed and believes, and therefore alleges, have directly and/or contributorily, infringed the said letters patents, and each of them, within the Central Division of the Southern District of California, and possibly elsewhere, since the issuance of said letters patents, and prior to the commencement of this suit, by manufacturing and using or causing to be manufactured and used, without the license or consent of plaintiff, apparatus containing the inventions of said letters patents and the claims thereof, and/or by employing, or causing to be employed without the license or consent of plaintiff, the method or process embodying one of the inventions of said letters patent No. 1,177,697, and claim 1 thereof.

XIII

That the defendants, and each of them, have been duly notified in writing of the said letters patents, and of their infringement thereof, but nevertheless, as plaintiff is

informed and believes, and therefore alleges, defendants, and each of them, have wilfully and intentionally continued and still continue and threaten further to continue to infringe the same.

XIV

That by reason of said infringing acts, the defendants have profited, and the plaintiff has been irreparably damaged.

WHEREFORE, plaintiff prays:

1. That the defendants and each of them, their officers, agents, servants, employees and attorneys, respectively, or those in active concert or participating with them be provisionally during the pendency of this cause, and permanently enjoined from further infringing upon plaintiff's said Letters Patent, and upon the rights of plaintiff thereunder.

2. That the defendants and each of them be required to account and pay to the plaintiff defendants' profits and plaintiff's damages and a sum in excess thereof, not to exceed three times the actual damages and profits.

3. That the defendants and each of them be required to pay the costs and disbursements of plaintiff in this suit.

4. That plaintiff have such other and further relief in the premises as to the Court may appear proper and aggrcable to equity.

CINEMA PATENTS COMPANY, INC.
a corporation,

Plaintiff,

By Herbert A Huebner

Attorney for Plaintiff

Los Angeles, California,
May 29, 1930

VERIFICATION

STATE OF NEW YORK)
) SS:
COUNTY OF NEW YORK)

M. J. SIEGEL, being duly sworn, deposes and says that he is the president of Cinema Patents Company, Inc., plaintiff; that he has read the foregoing Bill of Complaint, and knows the contents thereof; that the same is true to his own knowledge, except as to those matters stated upon information and belief, and as to those matters he believes it to be true.

M J Siegel

Sworn to before me this 26 day of May, 1930
[Seal] Edith M. Coltart
Notary Public New York County
NOTARY PUBLIC, New York County
N. Y. County Clk.'s No. 164, Reg. No. 2C181
Commission Expires Mar. 30, 1932

State of New York, } ss.: No. 21973 Series C
County of New York, }

I, DANIEL E. FINN, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, having a seal, DO HEREBY CERTIFY, That

Edith M. Coltart

whose name is subscribed to the deposition or certificate of the proof or acknowledgment of the annexed instrument, and thereon written, was, at the time of taking such deposition, or proof and acknowledgment, a Notary Pub-

lic in and for such County, duly commissioned and sworn, and authorized by the laws of said State, to take depositions and to administer oaths to be used in any Court of said State and for general purposes; and also to take acknowledgments and proofs of deeds, of conveyances for land, tenements or hereditaments in said State of New York. And further, that I am well acquainted with the handwriting of such Notary Public, and verily believe that the signature to said deposition or certificate of proof or acknowledgment is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Court and County, the 21 day of May 1930

Daniel E Finn

[Seal] Clerk.

[Endorsed]: Filed Jan 3-1930 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk

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[Title of Court and Cause.]

ANSWER OF
COLUMBIA PICTURES CORPORATION

Comes now Columbia Pictures Corporation, a corporation, and for its answer to the complaint herein, states as follows:

I

Answering Paragraph I of the Bill of Complaint herein, defendant, Columbia Pictures Corporation, is without knowledge as to the matters alleged therein and therefore denies that plaintiff, Cinema Patents Company,

Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of New York, or otherwise or at all; denies that Cinema Patents Company, Inc., is a citizen of the State of New York, or of any State, or that it has its principal office and place of business in the City of New York, County of New York, and State of New York, or elsewhere.

II

Answering Paragraph II of the Bill of Complaint herein, defendant, Columbia Pictures Corporation, admits the matters therein alleged.

III

Answering Paragraph III of the Bill of Complaint herein, defendant, Columbia Pictures Corporation, admits the matters alleged therein.

IV

Answering Paragraph IV of the Bill of Complaint herein, defendant, Columbia Pictures Corporation, is without knowledge as to the matters alleged therein and therefore denies that prior to the 17th day of February, 1909, or at any time, Leon Gaumont was the original, first or sole inventor of a certain new and useful method or apparatus for DEVELOPING, FIXING, TONING, AND OTHERWISE TREATING PHOTOGRAPHIC FILMS AND PRINTS, fully or otherwise described in Letters Patent No. 1,177,697; denies that such alleged invention had not been known or used by others in this country before his alleged invention thereof, or had not been patented or described in any printed publication in this or any other foreign country before his alleged invention thereof, or for more than two years prior to his alleged application for United States Letters Patent there-

for; denies that said alleged invention was not in public use or on sale in this country for more than two years prior to his said alleged application for said United States Letters Patent, or was not abandoned; denies that said alleged invention was not first patented or caused to be patented by the said inventor or his legal representatives or assigns in any foreign country upon an application filed more than twelve months prior to the filing of the said application for patent in this country.

V

Answering Paragraph V of the Bill of Complaint herein, defendant, Columbia Pictures Corporation, is without knowledge as to the matters alleged therein, therefore, denies that on the 17th day of February, 1909, or at any time, the said Leon Gaumont, as the inventor of said alleged invention, or otherwise or at all, applied for Letters Patent of the United States thereon; denies that the said Leon Gaumont complied with all or any of the laws, rules or regulations of the United States concerning such alleged application for patent; denies that such or any proceedings were had and that on the 4th day of April, 1916, or at any time, Letters Patent of or in the name of the United States of America, under seal of the Patent Office, signed by the Commissioner of Patents, in due form of law, and numbered 1,177,697, or otherwise or at all, were issued to said Leon Gaumont on said invention; denies that by such alleged issuance or any issuance of a patent to Leon Gaumont there was granted or secured to said Leon Gaumont, his successors or assigns, for seventeen years from the date of said alleged patent, or for any time or at all, the exclusive right, or any right, of making, using or vending to others to be used, the

alleged invention and improvements described in said alleged Letters Patent.

VI

Answering Paragraph VII of the Bill of Complaint herein, defendant, Columbia Pictures Corporation, denies that prior to September 15, 1915, or at any time or at all, Frederick B. Thompson, a citizen of the United States, was the original, first or sole inventor of a certain new and useful PHOTOGRAPHIC FILM TREATING APPARATUS, fully or otherwise described in Letters Patent No. 1,281,711; denies that said alleged invention had not been known or used by others in this country before his alleged invention thereof and had not been patented or described in any printed publication in this or any other foreign country before his alleged invention, or more than two years prior to his alleged application for United States Letters Patent therefor; denies that the said invention was not in public use or on sale in this country for more than two years prior to the said application for United States Letters Patent; denies that said alleged invention was not first patented or caused to be patented by said alleged inventor or his legal representatives or assigns in any foreign country for an application filed more than twelve months prior to the filing of his said application for patent.

VII

Answering Paragraph VIII of the Bill of Complaint herein, defendant, Columbia Pictures Corporation, denies that on the 15th day of September, 1915, or at any time or at all, the said Frederick B. Thompson, as the inventor of said invention, or otherwise or at all, applied for Letters Patent of the United States thereon; denies that

said Frederick B. Thompson complied with all or any of the laws, rules or regulations of the United States concerning such application; denies that such proceedings were had; that on the 15th day of October, 1918, or at any other time, Letters Patent of the United States, and in the name of the United States, were issued to said Frederick B. Thompson in due form of law or otherwise or at all, for said invention; denies that by any such alleged issuance of a patent there was granted or secured to said Frederick B. Thompson, his successors or assigns, for seventeen years from the date of said alleged patent, or for any time, the exclusive or any right of making, using or vending to others to be used, the alleged invention and improvements described in said Letters Patent.

VIII

Answering Paragraph IX of the Bill of Complaint herein, defendant, Columbia Pictures Corporation, admits the matters therein alleged.

IX

Answering Paragraph X of the Bill of Complaint herein, defendant, Columbia Pictures Corporation, denies that the alleged inventions patented in and by said Letters Patents No. 1,177,697 and No. 1,281,711, are capable of conjoint use; denies that said alleged inventions have been so used by this defendant; denies that said alleged inventions, or either of them, have been used by this defendant in infringement of said Letters Patent No. 1,177,697 and No. 1,281,711; this defendant denies that it has infringed said Letters Patents, or either of them, in any manner whatsoever.

X

Answering Paragraph XI of the Bill of Complaint herein, defendant, Columbia Pictures Corporation, denies that said alleged inventions alleged to be patented by said Letters Patent No. 1,177,697 and No. 1,281,711, or either of them, have been or are of great or any value or commercial utility; denies that the public in the United States of America or throughout the world has generally or at all recognized or acquiesced in the utility, value or patentability of said alleged inventions, or either of them, or has recognized or acquiesced in the validity of said Letters Patents, or either of them, or the exclusive or any rights of the plaintiff thereunder.

XI

Answering Paragraph XII of the Bill of Complaint herein, defendant, Columbia Pictures Corporation, denies that this defendant, severally, or jointly and severally, or jointly with Wm. Horsley Film Laboratories, Inc., a corporation, has directly or contributorily, or otherwise or at all, infringed the said alleged Letters Patents, or either of them, within the Central Division of the Southern District of California, or elsewhere or at all, since the issuance of said Letters Patents and prior to the commencement of this suit, or at any time, by manufacturing or using, or causing to be manufactured or used, either with or without the license or consent of plaintiff, apparatus containing the alleged inventions of said Letters Patents or the claims thereof, or has caused to be employed, or is or has been employing or causing to be employed, either with or without the license or consent of plaintiff, the method of process embodying one of the said alleged inventions of said Letters Patent No.

1,177,697, either as set forth in claim 1 thereof, or otherwise or at all. This defendant denies that it has committed any act or acts in infringement of said Letters Patents or either of them.

XII

Answering Paragraph XIII of the Bill of Complaint herein, defendant, Columbia Pictures Corporation, denies that this defendant severally or jointly with the defendant, Wm. Horsley Film Laboratories, Inc., or otherwise or at all, has wilfully or intentionally or in any manner whatsoever, infringed upon said Letters Patents, or either of them, or has committed any infringing acts whatsoever, or has wilfully or intentionally continued, or still continues or threatens further to continue to infringe upon the said Letters Patents or either of them.

XIII

Answering Paragraph XIV of the Bill of Complaint herein, defendant, Columbia Pictures Corporation, denies that by reason of any act or acts of itself, or by any joint act or acts with defendant, Wm. Horsley Film Laboratories, Inc., or otherwise or at all, defendant has profited or that plaintiff has been irreparably, or in any manner whatsoever, damaged by any act or acts of defendant.

XIV

Further answering said Bill of Complaint herein, defendant, Columbia Pictures Corporation, alleges that the alleged Letters Patents No. 1,177,697 and No. 1,281,711 were and are invalid for want of patentable invention.

XV

Further answering said Bill of Complaint herein, defendant, Columbia Pictures Corporation, alleges that in view of the prior art as and before the alleged inventions

of said Gaumont and Thompson, define the claims of said Letters Patents No. 1,177,697 and No. 1,281,711, said claims cannot be so interpreted as to bring within the perview thereof as infringements thereof, any machines, devices, methods or processes used by this defendant.

XVI

Further answering said Bill of Complaint herein, defendant, Columbia Pictures Corporation, alleges that during the pendency in the United States Patent Office of the alleged applications upon which the said Letters Patents in suit issued, the patentees so limited the claims of said patents in order to obtain favorable consideration of the same, that the patentees or those claiming title to said alleged Letters Patents cannot now ask for or obtain an interpretation of said claims which will bring the methods or devices of this defendant within the scope thereof.

XVII

Further answering said Bill of Complaint herein, defendant, Columbia Pictures Corporation, alleges that the alleged inventions of the patents in suit, in view of the state of the art as they existed at the dates of the alleged inventions, did not involve invention or contain any patentable novelty, but consisted in mere adaptation of well known methods and devices for the required uses involving merely mechanical skill.

AND AS A FURTHER, SEPARATE AND AFFIRMATIVE DEFENSE, THIS DEFENDANT ALLEGES:

I

This defendant is informed and believes and upon such information and belief, alleges that on or about the 26th day of June, 1925, a contract was made and entered into,

in writing, by and between Chester Bennett Film Laboratories, a corporation organized under the laws of the State of California, as party of the first part, Frederick B. Thompson, as party of the second part, Grace Seine Thompson, party of the third part, and the defendant, Wm. Horsley Film Laboratories, Inc., a corporation, as party of the fourth part, wherein and whereby it was agreed by and between the aforesaid parties that the parties of the first, second and third part would thereby grant to the party of the fourth part (the defendant, William Horsley Film Laboratories, Inc.) liberty and license to use two machines for treating, processing and developing photographic films for the full term of any and all of the patents, listed and referred to in said agreement as having been granted to the said Frederick B. Thompson, and among which were Letters Patent No. 1,328,464, and Letters Patent No. 1,260,595, and Letters Patent No. 1,299,266, and Letters Patent No. 1,281,711, and all other patents that might be granted to the said Frederick B. Thompson on certain patent applications listed and referred to in said agreement, or for any improvements thereon;

That it was further agreed in and by said contract in writing that the party of the first part, Chester Bennett Film Laboratories, a corporation, would construct and install within the laboratories of this defendant said two machines for treating, processing and developing photographic films and that for the use of said machines for said purposes, said Wm. Horsley Film Laboratories would pay royalty upon each foot of photographic film actually treated, developed or run through by the means of the said two machines and apparatus.

That a true copy of the aforesaid contract in writing is annexed and attached to this answer and marked Exhibit "A", and the same is by this reference incorporated herein as a part of this answer, the same as though said contract were herein fully set forth.

II

This defendant is informed and believes and upon such information and belief alleges, that pursuant to the terms of the aforesaid contract, said two machines were constructed and installed in the laboratory of this defendant in Los Angeles, California and ever since the construction and installation of said two machines the same have been continuously used by this defendant for the purpose of developing and treating photographic film and the same are now being used by this defendant for that purpose.

III

This defendant is informed and believes and upon such information and belief alleges, that the aforesaid agreement and the license therein contained have never been cancelled, terminated, forfeited or annulled and the same is now in full force and effect.

IV

This defendant is informed and believes and upon such information and belief alleges, that the two machines referred to in said agreement and which were constructed and installed by Chester Bennett Film Laboratories, a corporation, in the laboratories of this defendant, Wm. Horsley Film Laboratories, Inc., were and are the only machines which have ever been used or which are now being used by this defendant for the developing, treating or processing of photographic film.

V

This defendant is informed and believes and upon such information and belief alleges, that prior to the filing of the above entitled action and prior to the service of any notice of infringement by plaintiff in the above entitled action, the plaintiff became and ever since has been, and is now, the owner of the aforesaid contract in writing, together with the said two machines therein mentioned and described, together with all rights in and to the royalties provided for in said agreement, all of which matters are specifically alleged in the complaint filed by plaintiff in the Superior Court of the County of Los Angeles, State of California, which is more particularly described in the next succeeding paragraph of this answer.

VI

That on or about May 3rd, 1930, an action was filed in the Superior Court of the County of Los Angeles, State of California, entitled "Cinema Patents Company, Inc., a corporation, Plaintiff, vs. William Horsley Laboratories, Inc., a corporation, Defendant", being No. 302045; that the Cinema Patents Company, Inc., a corporation, plaintiff in the aforesaid action is the identical Cinema Patents Company, Inc., a corporation, complainant in this action, and that William Horsley Laboratories, Inc., a corporation, defendant in the said Superior Court action is the same corporation which is named as one of the defendants in this action.

That the last pleading filed in the aforesaid action on behalf of plaintiff therein was its first amended complaint; that a true copy of the said first amended complaint is attached hereto, marked Exhibit "B" and by this reference the same is incorporated herein and made a part

hereof the same as though said first amended complaint were here in full set forth.

VII

That the aforesaid action is at issue in the said Superior Court of Los Angeles County, State of California, and is now pending and has not been dismissed.

WHEREFORE, this answering defendant prays that complainant take nothing by its bill and that this answering defendant have judgment for its costs and disbursements expended herein and for such other and further relief as may be just and equitable.

COLUMBIA PICTURES CORPORATION
By Samuel J Briskin

Defendant

Loyd Wright
Charles E. Millikan
Frank L. A. Graham
Solicitors and of Counsel

EXHIBIT A

[Stamped]: R 83 J U. S. Dist. Court. So Dist of Cal. Div Def Exhibit A Filed Dec 26/30 Head Special Master

LICENSE AGREEMENT

THIS AGREEMENT, made and entered into this 26th day of June, 1925, by and between CHESTER BENNETT FILM LABORATORIES, a corporation organized under the laws of the State of California, and having its principal place of business at Los Angeles, California, hereinafter referred to as the party of the first part, and FREDRICK B. THOMPSON, of Los Angeles, Cali-

fornia, hereinafter referred as the party of the second part, and GRACE SEINE THOMPSON, of Los Angeles, California, hereinafter referred to as the party of the third part, and Wm. HORSLEY FILM LABORATORIES, INC., a corporation organized under the laws of the State of California and having its principal place of business at Los Angeles, California, hereinafter referred to as the party of the fourth part.

WITNESSETH: that

WHEREAS, Fredrick B. Thompson, did invent certain photographic film treating apparatus described in United States Letters Patent No. 1,281,711, issued October 15, 1918, to the said Fredrick B. Thompson; and

WHEREAS, said Fredrick B. Thompson did invent certain film treating apparatus described in United States Letters Patent No. 1,328,464, issued January 20, 1920 to the said Fredrick B. Thompson; and

WHEREAS, the said Fredrick B. Thompson did invent certain film treating apparatus described in United States Letters Patent No. 1,260,595, issued March 26, 1918, to the said Fredrick B. Thompson; and

WHEREAS, the said Fredrick B. Thompson did invent certain film wiping apparatus described in United States Letters Patent, No. 1,299,266, issued April 1, 1919, to the said Fredrick B. Thompson; and

WHEREAS, Fredrick B. Thompson did invent certain photographic film driers for which he filed application papers in the United States Patent Office on February 9, 1924, Serial Number 691,633; and

WHEREAS, said Fredrick B. Thompson did invent certain film treating apparatus, for which he filed applica-

tion papers in the United States Patent Office on February 9, 1924, Serial Number 691,634; and

WHEREAS, said Fredrick B. Thompson did, on the 27th day of August, 1923, enter into a license agreement with the party of the first part in respect to Letters Patent No. 1,328,464; No. 1,299,266; No. 1,281,711; No. 1,260,595, together with all improvements that he might make thereon; and

WHEREAS, the party of the third part warrants that she is the exclusive owner of United States Letters Patent No. 1,281,711; 1,299,266; 1,260,595; and 1,328,464, except for the interest conveyed to the party of the first part by that certain agreement of August 27, 1923, heretofore referred to; and

WHEREAS, the party of the fourth part is desirous of acquiring a license to operate two machines for treating, processing and developing photographic films, which machines and apparatus connected therewith are the invention of the said Fredrick B. Thompson, and the subject of the aforesaid patents and patent applications; and

WHEREAS, the party of the fourth part is desirous of having the parties of the first, second and third part construct and install the two machines for treating, processing and developing photographic films at the place of business of the party of the fourth part in the film laboratory of the party of the fourth part at 6060 Sunset Boulevard, Los Angeles, California,

NOW, THEREFORE, the said parties, in consideration of the hereinafter contained covenants and agreements, have and do hereby agree together as follows:

1. The parties of the first, second and third part do hereby grant to the party of the fourth part the right,

liberty and license to use two machines for treating, processing and developing photographic films for the full term of any and all of the aforesaid patents granted to the party of the second part and all other patents that may be granted to the party of the second part on the aforesaid patent applications or for any improvements thereon, for the consideration, period of time and under the conditions hereinafter expressed.

2. The party of the first part, under the direction of and with the assistance of the said party of the second part, agrees to construct and install within the laboratory of the party of the fourth part, two machines for treating, processing and developing photographic films, together with the appurtenances thereof and equipment and apparatus, in connection therewith, and the parties of the first, second and third part agree to lease to the party of the fourth part the said two machines for developing, processing and treating photographic films and the apparatus and equipment appurtenant thereto for the rental and on the terms and conditions hereinafter contained.

3. The party of the fourth part agrees to first prepare and put into condition for installation of the said machines and equipment a room in its laboratory at 6060 Sunset Boulevard, without cost to the parties of the first, second and third part, the preparation and putting into condition of said room to include the necessary excavations required therein and all other work incident to preparing the said room for the construction and installation of the said machines, apparatus and equipment; and the party of the fourth part agrees to install all necessary electric wiring and water piping that may be necessary in connection with the heaters and waters, in the operation of the said ma-

chines, the water piping to be run to the said heaters and the electric wiring and connections to be installed and placed as instructed by the party of the second part and as may be necessary to connect with the machines and apparatus for use in the installation thereof.

4. It is agreed by the parties hereto that the said machines and equipment, appurtenant thereto, shall be constructed and installed within ninety (90) days after the date of the execution of this agreement, PROVIDED, that the said room shall be prepared and ready for the installation thereof, at the time when the parties of the first and second part shall be prepared to place or install said machines and equipment and appurtenances thereof therein and allowing the necessary time thereafter for completing the said machines and the installation thereof with the necessary equipment and appurtenances.

5. The parties hereto agree that upon the installation and completion of the machines, apparatus and equipment, and for the period of the life of any or all of said patents or any patents that may be granted upon the applications above set forth, and for the further and additional time that the party of the fourth part may elect to use, maintain and operate said machines and equipment, the party of the fourth part shall have the right to use, operate and maintain the said machines, apparatus and equipment in the said laboratory of the party of the fourth part and for the purposes of the business conducted by the party of the fourth part at its said laboratory in treating, processing and developing photographic films, and the parties of the first, second and third part agree to lease, and do hereby lease to the said party of the fourth part, the said machines and apparatus connected therewith for the pur-

poses and for the terms above stated, and for the consideration hereinafter set forth.

6. The party of the fourth part, in consideration of the license above granted, and the installing of the said two machines by the parties of the first, second and third parts, agrees to pay as rental, compensation and royalty on the said machines, apparatus and equipment, and appurtenances thereto, including the installation and construction thereof, the sum of one mill per foot for and on account of all film actually treated, developed or run through by means of the said two machines and apparatus. The said rental is to be paid at the times and in the manner hereinafter provided.

7. The party of the fourth part, agrees to pay in advance, on account of said rental, the total cost of construction and installation of said two machines, and apparatus and appurtenances thereto, and ten per cent (10%) thereof in addition thereto, the said advance payment to be made as follows:

The party of the first part shall render a statement of the actual cost of the materials and labor used or necessary in the said construction and installation of the said two machines, at intervals of every two (2) weeks from and after the commencement of the work of said construction and installation, until the completion thereof, and the fourth party shall pay the amounts shown thereby, together with the additional payments as hereinafter stated.

8. The party of the fourth part agrees to pay to the party of the first part the cost incurred for and in connection with the said construction and installation of said machines, to the amount shown and evidenced by the state-

ments rendered and at the time of rendition of statement thereof, and ten (10) percent thereof in addition thereto: It being stipulated and provided however, that the total cost of said machines and apparatus, when installed and ready for operation, shall not be over the sum of Seven Thousand Five Hundred Dollars ($7500) each, including all equipment, the said ten (10) percent to be in addition to said total amount; the said amount to be based upon the cost of the said machines and the appurtenances thereto, exclusive of the cost to the party of the fourth part of the cost to him of the preparation and putting into condition of the said room for the installation of the said machines and the said ten per cent (10%) in addition thereto. IT BEING UNDERSTOOD, that the total cost, figured on this basis, to the party of the fourth part, of the installation of the two machines, in condition for operation, shall not be over Sixteen Thousand, five hundred (16,500) dollars exclusive of the cost of preparing and conditioning the said room.

9. IT IS MUTUALLY AGREED by the parties hereto that the amount to be so paid on account of the cost of construction installation and equipment and apparatus and appurtenances to the said two machines shall be applied or credited to the party of the fourth part as advance rental for the two machines, computed at the rate of one mill per foot, and no further payment or rental shall be due or payable until the film has been treated and run by means of the said machines and apparatus to the amount of the said total advanced payment.

10. IT IS FURTHER MUTUALLY AGREED by the parties hereto that after the total amount of credit for and on account of the said advanced payment shall

have been used and covered by the film treated and run as last above stated, that a discount or rebate shall thereafter be allowed to the party of the fourth part whereby the net rental to be paid for and on account of the photographic film treated, processed or developed by the said machines, apparatus and equipment appurtenant thereto, shall be one-fourth of one mill per foot instead of the rate or amount as above provided.

11. IT IS FURTHER MUTUALLY AGREED by the parties hereto that the said reduction or credit to be allowed is on the condition that no transfer or assignment of this lease, agreement and license, or any rights thereunder, shall be made by the party of the fourth part and that the said rebate or discount shall be allowed to the party of the fourth part on account of the film treated by the party of the fourth part in its said laboratory and that in case of any transfer or assignment by the said party of the fourth part of any rights under this agreement and license, the said rebate, allowance, and discount shall be withdrawn and terminated.

12. The party of the fourth part agrees to keep true and accurate books of account showing the number of feet of film treated, processed or developed by the said two machines which books of account shall be open during all usual business hours for the inspection of the parties of the first, second and third part, or their authorized agents, and the party of the fourth part agrees to render each month a statement to the parties of the first, second and third part, on the 10th day of each month during the term of this license setting forth a true statement of the number of feet of film treated, developed or processed by the said two machines during the preced-

ing month, and agrees to pay to the parties of the first, second and third part, by check, at the office of the party of the first part, at 6363 Santa Monica boulevard, Los Angeles, California, within ten (10) days thereafter, the rental due upon all such feet of film treated, processed or developed hereunder during the preceding month, time being of the essence of both the rendering of such statement and the payment of rentals.

13. IT IS FURTHER MUTUALLY COVENANTED AND AGREED that all costs and expenses incident to the operation and maintenance of the said two machines, apparatus and equipment therefor or appurtenant thereof, after the installation and completion thereof, including all reports thereon, shall be paid by the party of the fourth part at the cost to the party of the fourth part, and that no part of the cost of operation or expenses incident to the operation and maintenance of the said two machines shall be charged to the parties of the first, second, or third part, or paid by any of the said parties of the first, second or third part.

14. IT IS FURTHER MUTUALLY COVENANTED AND AGREED, as part of the consideration hereof, that the said two machines, apparatus and equipment appurtenant thereto, to be constructed and installed by the parties of the first, second and third part shall be and remain the property of the said parties of the first, second and third part, and that the said fourth party shall have no title or interest therein other than the right to the use thereof pursuant to the terms of this lease and license agreement, and that upon the expiration of the term hereof, or the termination of this lease and license agreement, the first, second and third parties shall

have the right to remove the said two machines, apparatus and equipment appurtenant thereto or connected therewith, and may enter into and upon the premises of the party of the fourth part wherein the same shall be installed and located for the purposes of removing the same, but that upon said removal from the said premises, the premises of the party of the fourth part shall be left in good order and condition.

It is provided and agreed, however, that upon the expiration of the said patents herein listed and described, if the said machines and equipment are at said time installed and being used pursuant to this agreement and if this agreement has not at said time been terminated, the fourth party shall have the option and right to purchase the said machines, apparatus and equipment, the amount to be paid therefor to be based upon the cost of said machines and apparatus and the equipment thereof, less a fair and proper amount for depreciation; and if the amount to be so paid cannot be mutually agreed upon at said time, three (3) referees shall be appointed, one to be named by the party of the first part and one by the party of the fourth part, the two so named to select the third, and said referees shall fix and determine the amount to be paid, their findings and determination to be final and binding upon the parties thereto.

IN WITNESS WHEREOF the parties of the first and fourth part have affixed their names and caused their corporate seals to be affixed hereto by their duly authorized officers, and the parties of the second and third

part have hereunto set their hands and seals the day and year first above set forth.

CHESTER BENNETT FILM
LABORATORIES, a corporation
By A. J. Guerin
corporate seal Vice President.

FRED B. THOMPSON
SECOND PARTY

GRACE SEINE THOMPSON
THIRD PARTY

ATTEST:
H. T. James
Secretary

WM HORSLEY FILM
LABORATORIES, INC.,
a corporation
By William Horsley
corporate seal President

ATTEST:
H. E. Dodge
Secretary

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

On this 26th day of June, A. D., 1925 before me, C. E. ELFSTROM, a Notary Public in and for the said County and State, residing therein, duly commissioned and sworn, personally appeared A. J. GUERIN known to me to be the Vice President and H. T. JAMES known to me to be the Secretary of the CHESTER BENNETT FILM LABORATORIES, the Corporation that executed the

within Instrument, known to me to be the persons who executed the within Instrument, on behalf of the Corporation therein named, and acknowledged to me that such Corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

C. E. ELFSTROM
Notary Public in and for said County and State.
(My Commission Expires Dec. 5, 1928)

EXHIBIT B

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES.

CINEMA PATENTS COMPANY, INC., a Corporation, PLAINTIFF, -vs- WILLIAM HORSLEY LABORATORIES, INC., a Corporation, DEFENDANT.	No. 302045 FIRST AMENDED COMPLAINT.

Comes now the Plaintiff, Cinema Patents Company, Inc., a Corporation, and for cause of action against the above named defendant, complains and alleges as follows, to-wit:

I

That on or about the 26th day of June, 1925, the Chester Bennett Film Laboratories, a Corporation, organized and existing under and by virtue of the laws of the State of California, with its principal place of business at Los Angeles, California, Frederick B. Thompson, of Los Angeles, California, Grace Seine Thompson, of Los Angeles, California, and William Horsley Film Laboratories, Inc., a Corporation, organized and existing under and by virtue of the laws of the State of California, with its principal place of business at Los Angeles, California, entered into a license agreement in writing, wherein, among other things, it was, in substance, provided that the Chester Bennett Film Laboratories, a Corporation, Frederick B. Thompson and Grace Seine Thompson agreed to lease to the William Horsley Film Laboratories, Inc., a Corporation, two machines for treating, processing and developing photographic films, together with the appurtenances thereof and equipment and apparatus in connection therewith. And the said Chester Bennett Film Laboratories, a Corporation, did further agree to construct and install said two machines in the laboratory of the said William Horsley Film Laboratories, Inc., a corporation. It was further provided in said license agreement that the William Horsley Film Laboratories, Inc., a Corporation, should have the right to use, operate and maintain the said machines, apparatus and equipment in the said Laboratory of the said William Horsley Film Laboratories, Inc., a Corporation, for the purpose of treating, processing and developing photographic films; that in consideration of the rights therein granted to the said William Horsley Film Laboratories,

Inc., a Corporation, by Chester Bennett Film Laboratories, a Corporation, Frederick B. Thompson and Grace Seine Thompson, the said William Horsley Film Laboratories, Inc., a Corporation, did agree, among other things, to pay as rental, compensation and royalty on the said machines, apparatus and equipment and appurtenances thereto, the sum of one mill per foot for and on account of films actually treated, developed or run through by means of the said two machines and apparatus, until the said William Horsley Laboratories, Inc., a Corporation, paid to the other named parties a total sum equal to the cost of the said two machines and ten (10%) per cent in addition thereto,—after which the said William Horsley Film Laboratories, Inc., a Corporation, agreed to pay to the other named parties as rental or royalty, the sum of one-fourth of one mill per foot for and on account of all films actually treated, developed or run through by means of the said two machines and apparatus,—except in the event of the assignment of the said agreement by the said William Horsley Film Laboratories, Inc., a Corporation, to another party, in which event the original rate, to-wit, one mill per foot for film treated, developed or run through by means of the said two machines and apparatus, was to be resumed and continue in effect; that it was further agreed and provided in said license agreement that the said defendant, William Horsley Film Laboratories, Inc., a Corporation, would, on the 10th day of each month during the term of the license agreement, render a true statement of the number of feet of film treated, developed or processed by the said two machines during the preceding month, and said William Horsley Film Laboratories, Inc., a Corporation,

agreed to pay by check within ten days thereafter rental due upon all such footage of film treated, processed or developed during the preceding month,—time being the essence of both the rendering of such statement and the payment of rentals.

That after the execution of the said agreement, as aforesaid, the Chester Bennett Film Laboratories, a Corporation, Frederick B. Thompson and Grace Seine Thompson in good faith entered into and performed all of the conditions which said license agreement required on their part to be performed; that ever since the construction, and installation of said two machines the said William Horsley Film Laboratories, Inc., a Corporation, have been in the possession and full enjoyment and use of said machines, apparatus and equipment.

II

That on or about the 22nd day of January, 1927, by an instrument in writing, the Chester Bennett Film Laboratories, a Corporation, assigned, conveyed and transferred to Spoor-Thompson Machine Company, an Illinois Corporation, the title to and ownership of said license agreement, and the royalties accruing and payable thereon, and all the right, title and interest which the said Chester Bennett Film Laboratories, a Corporation, had in and to the said license agreement entered into on the 26th day of June, 1925, by and between Chester Bennett Film Laboratories, a Corporation, Frederick B. Thompson, Grace Seine Thompson and William Horsley Film Laboratories, Inc., a Corporation, and the title and ownership in and to the said two film developing machines, the subject of the said license agreement: that subsequent to the 22nd day of June, 1927, and on or about the 17th

day of February, 1928, by an instrument in writing the said Frederick B. Thompson and Grace Seine Thompson did consent to and approve the said assignment of January 22, 1927, to the Spoor-Thompson Machine Company, a Corporation.

III.

That on or about the 16th day of April, 1930, the Spoor-Thompson Machine Company, by an instrument in writing, assigned all their right, title and interest in and to said license agreement of June 26, 1925, to CINEMA PATENTS COMPANY, INC., a Corporation, organized and existing under and by virtue of the laws of the State of New York, plaintiff herein, together with the title and ownership in and to the said two film developing machines, and the said CINEMA PATENTS COMPANY, INC., a Corporation, plaintiff herein, has ever since been and now is the owner and holder of the said license agreement and all of the rights thereunder.

IV

That since the month of October, 1925, defendant William Horsley Film Laboratories, Inc., a Corporation, has violated the terms and conditions of said license agreement in that said defendant has filed statements, in accordance with said license agreement, which said statements were false and untrue in that they did not state the true number of feet of photographic film treated, developed or processed by said two machines during each of the preceding months.

V

That since the month of October, 1925, the defendant William Horsley Film Laboratories, Inc., a Corporation, has violated the terms and conditions of said license agree-

ment in that said defendant has failed to pay to said plaintiff as rental, compensation and royalty the sum provided in said license agreement for the number of feet of photographic film actually treated, developed or processed by said two machines.

VI

That said defendant has further violated the terms and conditions of said license agreement in that said defendant has, without the consent or approval of plaintiff or any of its predecessors in interest, redesigned, reconstructed, modified and rebuilt one or both of the said two photographic film developing machines which were and continue to be the sole property of the plaintiff herein; that said redesigning, reconstructing, modifying and rebuilding of the said machines, or one of them, was not necessary to continue the use and operation, or to maintain, the said machines or machine, and that so redesigning, reconstructing and modifying and rebuilding the said machines or machine has and does constitute such material alterations and changes in the machines or machine that the fundamental object, nature and purposes of the said machines or machine has been changed in the following respect, to-wit: That the said machines, as originally installed and operated, were intended and adapted for the development of photographic positive film only, and the alterations and changes made by the said defendant have converted and do convert the said machines or machine into apparatus intended and adapted for the development of photographic negative film; that the aforesaid alterations and changes are in part as follows: The building in of an additional developing tank, together with two complete systems or series of film supporting

and driving rollers, with shafts and gear-housings to drive the driving rollers; also the reconstructing of the main frame to support some of the additional parts enumerated; that said defendant has further violated the terms and conditions of the said license agreement in that it has, without the consent or approval of the plaintiff or any of its predecessors in interest, further modified, altered and changed the one or both of the said two machines by machining grooves in some or all of the supporting and driving rollers for the purpose of adapting the said machines or machine to the development, processing and treating of 16 M/M photographic motion picture film, commonly known as amateur film,—all of which is without the spirit and intent of the aforesaid license agreement. That defendant has, since so redesigning, reconstructing and altering said machines or machine, operated, is now operating, and threatens to and will continue operating, unless restrained, the said machines or machine for the purpose of developing, treating and processing negative photographic film, and has and now does and threatens to continue to and will actually develop in said machines or machine negative photographic film unless restrained by this court. That the plaintiff and/or its predecessors in interest had no notice of the aforesaid violations on the part of the defendant of its agreement, and had no notice of its acts and conduct in derivation and defiance of the rights of the plaintiff, and its predecessors in interest until on or about October, 1929, and since that date, and until the time of the filing of this action, plaintiff has been investigating and verifying its information regarding the said acts and conduct of the defendant, and did not secure and have such full

verification and knowledge until on or about the time of the filing of this action.

VII

That plaintiff is engaged in the business of licensing and leasing several different types of machines for the development of motion picture films; that certain of said machines leased to certain laboratories are adapted for the specific purpose of developing, processing and treating negative films of standard size, to-wit, 35 M/M; that certain other of said machines licensed or leased by plaintiff to laboratories other than defendant, are specifically adapted for the processing, developing and treating of grandeur film, to-wit 70 M/M film; that certain other machines licensed or leased by plaintiff to other film developing laboratories than defendant, are specifically adapted for the purpose of development of amateur films, to-wit, 16 M/M films; that certain other types of machines licensed or leased by plaintiff are specifically adapted for the development of positive films; that machines adapted solely for the development, processing and treating of positive films cannot be used for the developing, processing or treating of negative photographic films.

That the terms and conditions upon which plaintiff licenses or leases film developing machines to laboratories other than defendant include implied warranties to the respective licensees or lessees of an exclusive use of the respective machines for the developing, processing and treating of that size and type of photographic motion picture film for which said machines are adapted; that plaintiff is informed and believes and therefore alleges defendant has developed, processed and treated negative motion picture film for customers of plaintiff's licensees

or lessees and has thus deprived plaintiff's licensees or lessees of business and revenue therefrom to which said licensees or lessees were justly entitled; that the violation of one licensee or lessee, to-wit, defendant herein, of the exclusive right or rights enjoyed by one or another of plaintiff's licensees and lessees, other than defendant, by the perverted use of the machine or machines in developing, treating and processing negative photographic films, has and is laying the plaintiff open to actions for breach of implied warranty, and has and is causing and will continue to cause,—unless the perverted operation is restrained and enjoined,—unrest among plaintiff's licensees or lessees, other than defendant, and that some or all of said licensees or lessees, other than defendant, have threatened and continue to threaten to and will refuse to continue using and paying royalties for the use of film developing machines, as aforesaid.

VIII

That said plaintiff is engaged in the business of leasing and licensing to laboratories machines adapted for the purpose of developing, processing or treating photographic films, and that by reason of the operation of the said machine and/or machines as now carried on by defendant, in that said defendant is so operating said machines that they are developing, treating and processing negative photographic films instead of positive photographic films, (for which said machines were constructed and installed under said license agreement), and if defendant is not restrained and enjoined from operating said machines, as aforesaid, it will cause plaintiff to suffer great and irreparable injury, which said injury is more in particular as follows: That said plaintiff,

and its predecessors in interest, at all times herein mentioned has been and plaintiff is now engaged in the business of leasing and licensing to laboratories certain patented machines adapted for the purpose of developing, processing and treating photographic films; that the plaintiff and said predecessors in interest at said times were exclusively the owner of the patent rights in said machines, and possessed certain patent rights on machines which developed photographic negative films, and different machines for the development of photographic positive films; that at the time the contract with defendant was entered into, as aforesaid, it was understood and agreed by the parties thereto that said licensing agreement would and should permit the use of the machines referred to therein by said defendant for the development of photographic positive films only; that during said times plaintiff and its predecessors in interest have entered into licensing or leasing contracts with many other persons of machines adapted for the purpose of developing photographic negative films, and has impliedly warranted to said parties that no other machine shall be used under license or lease from plaintiff for the developing of such negative films; that plaintiff and its predecessors in interest have expended large sums of money in the development of the processes of producing said photographic films and in securing patents on said machines, and have expended large sums of money in advertising the same, and it has become generally known among laboratories and similar businesses that the plaintiff has the exclusive right to manufacture and license said machines; that plaintiff has received many intimations and evidences of loss of business on account of

the fact that it is becoming generally known that the defendant herein is using the machines of plaintiff contrary to the terms of the licensing contract aforesaid, and plaintiff has suffered pecuniary loss thereby; that plaintiff is also threatened with lawsuits from such other parties to whom plaintiff has impliedly warranted that no other machines such as those of defendant shall be used or licensed for the purpose of developing negative photographic films; that the continuation of the use by the defendant of said machines for the purpose of developing, processing and treating photographic negative films injured and will continue to injure the business of plaintiff and its income and profits which it derives from the licensing and/or leasing of said machines; that by reason of the acts and conduct of the defendant as herein set forth plaintiff will be subjected to a multiplicity of suits and it will also have to bring several different actions against the defendant; that plaintiff asks for an injunction pendente lite, and for a permanent injunction against the further use of the machines of the defendant, and plaintiff has no adequate and available remedy at law against the threatened, unauthorized use of said machines by the defendant for the purpose of developing, processing and treating negative photographic films by an action for damages inasmuch as the injury is a continuous one and would involve endless litigation, and it is further more of such a nature, affecting plaintiff's business in various places, that its extent could not be measured or estimated, or proof of the full measure of damages be procured; that plaintiff has no plain, speedy or adequate remedy at law and has been and will be irreparable damaged;

That unless defendant is restrained from using said machines for the purpose of developing, processing or treating negative photographic films other licensees or lessees now operating machines for the purpose of developing, processing and treating positive photographic films under similar agreements as that under which defendant is operating, will also claim the right to, and they do threaten to and will use the said machine so licensed or leased in the same manner as the defendant is attempting to and is using his said machines as hereinbefore set forth.

IX

That among other things in said license agreement it is provided that the said two machines, apparatus and equipment appurtenant thereto, shall be and remain the property of the said first, second and third parties, and that said fourth party shall have no title or interest therein other than the right to the use thereof pursuant to the terms of the lease and license agreement, and that upon the termination of the lease and license agreement the said parties of the first, second and third part shall have the right to remove said two machines, apparatus and equipment appurtenant thereto or connected therewith, and may enter into and upon the premises of the party of the fourth part wherein the same shall be installed and located, for the purpose of removing the same.

X

That a controversy has arisen between the parties to this license agreement relating to the legal rights and duties of the respective parties operating under said license agreement.

XI

That plaintiff has no plain, speedy or adequate remedy at law.

WHEREFORE: Plaintiff prays that the court give judgment against defendant as follows, to-wit:

1. That defendant be required to account to the plaintiff for all photographic film developed, processed or treated in and by the said two machines, and that the defendant be further required to pay to the plaintiff such sum or sums as are found to be the difference between those amounts actually heretofore paid by the defendant to the plaintiff or its predecessors in interest, and the amounts actually due plaintiff, or its predecessors in interest, under the said license agreement.

2. That the court declare the license agreement terminated and that the property now in the hands of the defendant be returned to the plaintiff herein.

3. That the court make a declaration of the rights and/or duties of the said parties to the said license agreement.

4. That an order be issued by this court directing this defendant to appear at a time and place to be fixed by this court, and show cause, if any it may have, why a preliminary injunction should not issue pending this action, restraining and enjoining said defendant from operating said two machines, or either of them, for the purpose of developing, processing or treating negative photographic film, and that contemporaneously with the issuance of the said order to show cause, such a temporary restraining order issue pending the hearing of the said order to show cause.

5. That defendant be permanently restrained and enjoined from using the said two machines, or either of them for the purpose of processing, developing or treating negative photographic film.

6. For such other and further relief as to the court may seem meet and just in the premises.

ARTHUR S. GUERIN
HERBERT A. HUEBNER
CLIFFORD THOMS
Attorneys for Plaintiff.

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) ss

ARTHUR S. GUERIN, being by me first duly sworn, deposes and says: That he is the attorney for the plaintiff in the above entitled action; that he has read the foregoing First Amended Complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters that he believes it to be true; that the reason why this verification is not made by the plaintiff is because the said plaintiff and all of its officers are absent from Los Angeles County, where affiant has his office.

Arthur S. Guerin

Subscribed and sworn to before me this 10th day of May, 1930.

[Seal] Opal Lisenby
Notary Public in and for said County and State

[Endorsed]: Received copy of within Answer this 25 day of July, 1930. Herbert A Huebner By Robt. M. McManigal Attorney for Plaintiff Filed Jul 25 1930 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk

[Title of Court and Cause.]

ANSWER OF WM. HORSLEY FILM LABORATORIES, INC.

Comes now Wm. Horsley Film Laboratories, Inc., and for its answer to the complaint herein, states as follows:

I

Answering Paragraph I of the Bill of Complaint herein, defendant, Wm. Horsley Film Laboratories, Inc., is without knowledge as to the matters alleged therein and therefore denies that plaintiff, Cinema Patents Company, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of New York, or otherwise or at all; denies that Cinema Patents Company, Inc., is a citizen of the State of New York, or of any State, or that it has its principal office and place of business in the City of New York, County of New York, and State of New York, or elsewhere.

II

Answering Paragraph II of the Bill of Complaint herein, defendant, Wm. Horsley Film Laboratories, Inc., admits the matters therein alleged.

III

Answering Paragraph III of the Bill of Complaint herein, defendant, Wm. Horsley Film Laboratories, Inc., admits the matters alleged therein.

IV

Answering Paragraph IV of the Bill of Complaint herein, defendant, Wm. Horsley Film Laboratories, Inc., denies that prior to the 17th day of February, 1909, or at any time, Leon Gaumont was the original, first or sole inventor of a certain new and useful method or apparatus for DEVELOPING, FIXING, TONING, AND

OTHERWISE TREATING PHOTOGRAPHIC FILMS AND PRINTS, fully or otherwise described in Letters Patent No. 1,177,697; denies that such alleged invention had not been known or used by others in this country before his alleged invention thereof, or had not been patented or described in any printed publication in this or any other foreign country before his alleged invention thereof, or for more than two years prior to his alleged application for United States Letters Patent therefor; denies that said alleged invention was not in public use or on sale in this country for more than two years prior to his said alleged application for said United States Letters Patent, or was not abandoned; denies that said alleged invention was not first patented or caused to be patented by the said inventor or his legal representatives or assigns in any foreign country upon an application filed more than twelve months prior to the filing of the said application for patent in this country.

V

Answering Paragraph V of the Bill of Complaint herein, defendant, Wm. Horsley Film Laboratories, Inc., denies that on the 17th day of February, 1909, or at any time, the said Leon Gaumont, as the inventor of said alleged invention, or otherwise or at all, applied for Letters Patent of the United States thereon; denies that the said Leon Gaumont complied with all or any of the laws, rules or regulations of the United States concerning such alleged application for patent; denies that such or any proceedings were had and that on the 4th day of April, 1916, or at any time, Letters Patent of or in the name of the United States of America, under seal of the Patent Office, signed by the Commissioner of Patents,

in due form of law, and numbered 1,177,697, or otherwise or at all, were issued to said Leon Gaumont on said invention; denies that by such alleged issuance or any issuance of a patent to Leon Gaumont there was granted or secured to said Leon Gaumont, his successors or assigns, for seventeen years, from the date of said alleged patent, or for any time or at all, the exclusive right, or any right, of making, using or vending to others to be used, the alleged invention and improvements described in said alleged Letters Patent.

VI

Answering Paragraph VII of the Bill of Complaint herein, defendant, Wm. Horsley Film Laboratories, Inc., denies that prior to September 15, 1915, or at any time or at all, Frederick B. Thompson, a citizen of the United States, was the original, first or sole inventor of a certain new and useful PHOTOGRAPHIC FILM TREATING APPARATUS, fully or otherwise described in Letters Patent No. 1,281,711; denies that said alleged invention had not been known or used by others in this country before his alleged invention thereof and had not been patented or described in any printed publication in this or any other foreign country before his alleged invention, or more than two years prior to his alleged application for United States Letters Patent therefor; denies that the said invention was not in public use or on sale in this country for more than two years prior to the said application for United States Letters Patent; denies that said alleged invention was not first patented or caused to be patented by said alleged inventor or his legal representatives or assigns in any foreign country for an ap-

plication filed more than twelve months prior to the filing of his said application for patent.

VII

Answering Paragraph VIII of the Bill of Complaint herein, defendant, Wm. Horsley Film Laboratories, Inc., denies that on the 15th day of September, 1915, or at any time or at all, the said Frederick B. Thompson, as the inventor of said invention, or otherwise or at all, applied for Letters Patent of the United States thereon; denies that said Frederick B. Thompson complied with all or any of the laws, rules or regulations of the United States concerning such application; denies that such proceedings were had; that on the 15th day of October, 1918, or at any other time, Letters Patent of the United States, and in the name of the United States, were issued to said Frederick B. Thompson in due form of law or otherwise or at all, for said invention; denies that by any such alleged issuance of a patent there was granted or secured to said Frederick B. Thompson, his successors or assigns, for seventeen years from the date of said alleged patent or for any time, the exclusive or any right of making, using or vending to others to be used, the alleged invention and improvements described in said Letters Patent.

VIII

Answering Paragraph IX of the Bill of Complaint herein, defendant, Wm. Horsley Film Laboratories, Inc., admits the matters therein alleged.

IX

Answering Paragraph X of the Bill of Complaint herein, defendant, Wm. Horsley Film Laboratories, Inc., denies that the alleged inventions patented in and by said

Letters Patents No. 1,177,697 and No. 1,281,711, are capable of conjoint use; denies that said alleged inventions have been so used by this defendant; denies that said alleged inventions, or either of them, have been used by this defendant in infringement of said Letters Patent No. 1,177,697 and No. 1,281,711; this defendant denies that it has infringed said Letters Patents, or either of them, in any manner whatsoever.

X

Answering Paragraph XI of the Bill of Complaint herein, defendant, Wm. Horsley Film Laboratories, Inc., denies that said alleged inventions alleged to be patented by said Letters Patent No. 1,177,697 and No. 1,281,711, or either of them, have been or are of great or any value or commercial utility; denies that the public in the United States of America or throughout the world has generally or at all recognized or acquiesced in the utility, value or patentability of said alleged inventions, or either of them, or has recognized or acquiesced in the validity of said Letters Patents, or either of them, or the exclusive or any rights of the plaintiff thereunder.

XI

Answering Paragraph XII of the Bill of Complaint herein, defendant, Wm. Horsley Film Laboratories, Inc., denies that this defendant, severally, or jointly and severally, or jointly with Columbia Pictures Corporation, a corporation, has directly or contributorily, or otherwise or at all, infringed the said alleged Letters Patents, or either of them, within the Central Division of the Southern District of California, or elsewhere or at all, since the issuance of said Letters Patents and prior to the commencement of this suit, or at any time, by manufacturing

or using, or causing to be manufactured or used, either with or without the license or consent of plaintiff, apparatus containing the alleged inventions of said Letters Patents or the claims thereof, or has caused to be employed, or is or has been employing or causing to be employed, either with or without the license or consent of plaintiff, the method of process embodying one of the said alleged inventions of said Letters Patent No. 1,-177,697, either as set forth in claim 1 thereof, or otherwise or at all. This defendant denies that it has committed any act or acts in infringement of said Letters Patents or either of them.

XII

Answering Paragraph XIII of the Bill of Complaint herein, defendant, Wm. Horsley Film Laboratories, Inc., denies that this defendant severally or jointly with the defendant, Columbia Pictures Corporation, or otherwise or at all, has wilfully or intentionally or in any manner whatsoever infringed upon said Letters Patents or either of them, or has committed any infringing acts whatsoever, or has wilfully or intentionally continued, or still continues or threatens further to continue to infringe upon the said Letters Patents or either of them.

XIII

Answering Paragraph XIV of the Bill of Complaint herein, defendant, Wm. Horsley Film Laboratories, Inc., denies that by reason of any act or acts of itself, or by any joint act or acts with defendant, Columbia Pictures Corporation, or otherwise or at all, defendant has profited or that plaintiff has been irreparably, or in any manner whatsoever, damaged by any act or acts of defendant.

XIV

Further answering said Bill of Complaint herein, defendant, Wm. Horsley Film Laboratories, Inc., alleges that the alleged Letters Patents No. 1,177,697 and No. 1,281,711 were and are invalid for want of patentable invention.

XV

Further answering said Bill of Complaint herein, defendant, Wm. Horsley Film Laboratories, Inc., alleges that in view of the prior art as and before the alleged inventions of said Gaumont and Thompson, define the claims of said Letters Patents No. 1,177,697 and No. 1,281,711, said claims cannot be so interpreted as to bring within the purview thereof as infringements thereof, any machines, devices, methods or processes used by this defendant.

XVI

Further answering said Bill of Complaint herein, defendant, Wm. Horsley Film Laboratories, Inc., alleges that during the pendency in the United States Patent Office of the alleged applications upon which the said Letters Patents in suit issued, the patentees so limited the claims of said patents in order to obtain favorable consideration of the same; that the patentees or those claiming title to said alleged Letters Patents cannot now ask for or obtain an interpretation of said claims which will bring the methods or devices of this defendant within the scope thereof.

XVII

Further answering said Bill of Complaint herein, defendant, Wm. Horsley Film Laboratories, Inc., alleges that the alleged inventions of the patents in suit, in view

of the state of the art as they existed at the dates of the alleged inventions, did not involve invention or contain any patentable novelty, but consisted in mere adaptation of well known methods and devices for the required uses involving merely mechanical skill.

AND AS A FURTHER, SEPARATE AND AFFIRMATIVE DEFENSE, THIS DEFENDANT ALLEGES:

I

That on or about the 26th day of June, 1925, a contract was made and entered into, in writing, by and between Chester Bennett Film Laboratories, a corporation organized under the laws of the State of California, as party of the first part, Fredrick B. Thompson, as party of the second part, Grace Seine Thompson, party of the third part, and the defendant, William Horsley Film Laboratories, Inc., a corporation, as party of the fourth part, wherein and whereby it was agreed by and between the aforesaid parties that the parties of the first, second and third part would thereby grant to the party of the fourth part (the defendant, William Horsley Film Laboratories, Inc.) liberty and license to use two machines for treating, processing and developing photographic films for the full term of any and all of the patents, listed and referred to in said agreement as having been granted to the said Fredrick B. Thompson, and among which were Letters Patent No. 1,328,464, and Letters Patent No. 1,260,595, and Letters Patent No. 1,299,266, and Letters Patent No. 1,281,711, and all other patents that might be granted to the said Fredrick B. Thompson on certain patent applications listed and

referred to in said agreement, or for any improvements thereon;

That it was further agreed in and by said contract in writing that the party of the first part, Chester Bennett Film Laboratories, a corporation, would construct and install within the laboratories of this defendant said two machines for treating, processing and developing photographic films and that for the use of said machines for said purposes, said William Horsley Film Laboratories would pay royalty upon each foot of photographic film actually treated, developed or run through by the means of the said two machines and apparatus.

That a true copy of the aforesaid contract in writing is annexed and attached to this answer and marked Exhibit "A", and the same is by this reference incorporated herein as a part of this answer, the same as though said contract were herein fully set forth.

II

That pursuant to the terms of the aforesaid contract, said two machines were constructed and installed in the laboratory of this defendant in Los Angeles, California, and ever since the construction and installation of said two machines the same have been continuously used by this defendant for the purpose of developing and treating photographic film and the same are now being used by this defendant for that purpose.

III

That the aforesaid agreement and the license therein contained have never been cancelled, terminated, forfeited or annulled and the same is now in full force and effect.

IV

That the two machines referred to in said agreement and which were constructed and installed by Chester

Bennett Film Laboratories, a corporation, in the laboratories of this defendant, William Horsley Film Laboratories, Inc., were and are the only machines which have ever been used or which are now being used by this defendant for the developing, treating or processing of photographic film.

V

This defendant is informed and believes and upon such information and belief, alleges that prior to the filing of the above entitled action and prior to the service of any notice of infringement by plaintiff in the above entitled action, the plaintiff became and ever since has been, and is now, the owner of the aforesaid contract in writing, together with the said two machines therein mentioned and described, together with all rights in and to the royalties provided for in said agreement, all of which matters are specifically alleged in the complaint filed by plaintiff in the Superior Court of the County of Los Angeles, State of California, which is more particularly described in the next succeeding paragraph of this answer.

VI

That on or about May 3rd, 1930, an action was filed in the Superior Court of the County of Los Angeles, State of California, entitled "Cinema Patents Company, Inc., a corporation, Plaintiff, vs. William Horsley Laboratories, Inc., a corporation, Defendant", being No. 302045; that the Cinema Patents Company, Inc., a corporation, plaintiff in the aforesaid action is the identical Cinema Patents Company, Inc., a corporation, complainant in this action, and that William Horsley Laboratories, Inc., a corporation, defendant in the said Superior Court

action is the same corporation which is named as one of the defendants in this action and is this answering defendant.

That the last pleading filed in the aforesaid action on behalf of plaintiff therein was its first amended complaint; that a true copy of the said first amended complaint is attached hereto, marked Exhibit "B" and by this reference the same is incorporated herein and made a part hereof the same as though said first amended complaint were herein fully set forth.

VII

That the aforesaid action is at issue in the said Superior Court of Los Angeles County, State of California, and is now pending and has not been dismissed.

WHEREFORE, this answering defendant prays that complainant take nothing by its bill and that this answering defendant have judgment for its costs and disbursements expendeded herein and for such other and further relief as may be just and equitable.

WILLIAM HORSLEY FILM
LABORATORIES, INC.
By Harry Cohn
Defendant

Loyd Wright
Charles E. Millikan
Frank L. A. Graham
Solicitors and of Counsel

[Endorsed]: Received copy of within Answer this 25 day of July, 1930 Herbert A Huebner by Robert M. McManigal, Attorney for Plaintiff Filed Jul 25 1930 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk

[TITLE OF COURT AND CAUSE.]

ORDER RE INTERROGATORIES

The plaintiff having exhibited to the Court the annexed interrogatories to be answered by the defendants, as indicated in the note at the foot of the interrogatories, and having applied to the Court for an order allowing the plaintiff to file such interrogatories to be answered under oath by the defendant corporations, by respective officers thereof having knowledge of the facts,

IT IS THEREFORE ORDERED that the said interrogatories be filed and served pursuant to Equity Rule 58 and that defendants, Columbia Pictures Corporation, a corporation, and William Horsley Film Laboratories, Inc., a corporation, by respective officers thereof having knowledge of the facts, separately answer such interrogatories as are designated in the note at the foot of the interrogatories to be answered by the respective defendants, that the answers be made under oath and filed within fifteen days after service thereof unless objection in writing be filed within ten days after service.

Los Angeles, California June 14 1930

Wm P James
United States District Judge

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION.

CINEMA PATENTS COMPANY, INC., a corporation	)	
Plaintiff	)	In Equity
vs.	)	
	)	No. R-83-J
COLUMBIA PICTURES CORPORATION, a corporation, and WILLIAM HORSLEY FILM LABORATORIES, INC., a corporation,	)	
Defendants.	)	

PLAINTIFF'S INTERROGATORIES

Now comes the Plaintiff, and having first obtained leave of Court, propounds these, its interrogatories, to be answered as indicated in the note at the foot hereof:

1—Is it true that Columbia Pictures Corporation owns or controls more than fifty per cent of the voting stock of William Horsley Film Laboratories, Inc.? If so, when was such ownership or control acquired?

2—Is it true that Columbia Pictures Corporation had, prior to the filing of this suit, and is having, motion picture film developed, treated or processed by William Horsley Film Laboratories, Inc.,

3—Is it true that William Horsley Film Laboratories, Inc. did, prior to the filing of this suit and does develop, treat or process motion picture film for Columbia Pictures Corporation exclusively?

4—What relation exists between Columbia Pictures Corporation and William Horsley Laboratories, Inc. and when did such relation originate?

5—Who are the officers of Columbia Pictures Corporation?

6—Who are the officers of William Horsley Film Laboratories, Inc.?

7—Is it true that William Horsley Film Laboratories, Inc. occupies quarters within the studio and offices of Columbia Pictures Corporation and has since prior to the filing of this suit?

8—Is it true that on or about June 26th, 1925, William Horsley Film Laboratories, Inc. leased from Chester Bennett Film Laboratories, a California corporation, Frederick B. Thompson, and Grace Seine Thompson, two Spoor-Thompson motion picture film developing machines, and accepted in connection with said lease a license to operate said machines under certain patents, including United States Letters Patent No. 1,281,711?

9—Did William Horsley Film Laboratories, Inc. pay sums of money to the lessors and licensors aforesaid for the use of said machines?

10—Produce and file and serve a copy on plaintiff's counsel a drawing, cut or photograph truly and correctly illustrating the film developing machines as and when first installed and operated.

11—Produce and file and serve a copy on plaintiff's counsel a drawing, cut or photograph truly and correctly illustrating the film developing machines as they were immediately prior to the filing of this suit.

12—Specify what repairs, replacements, changes, modifications, alterations or additions have been made upon each of said machines since first installed and operated, when and by whom and at whose order?

13—How many feet of 35 millimeter film were adapted to be contained at any one time in the developing tanks of each machine as and when first installed and operated?

14—How many feet of 35 millimeter film were adapted to be contained at any one time in the developing tanks of each machine as they were immediately prior to the filing of this suit?

15—For what purpose was this change made?

16—When, by whom and at whose order was this change made?

17—Were both machines operated, in their original condition, for developing positive motion picture film on a commercial scale?

18—How long were they so operated?

19—How many feet of film were developed, treated or processed prior to changing over the machine or machines?

20—Have both, or either, of said machines been operated during the summer of 1929 and/or since for developing negative motion picture film? If so, which of the machines has been so used? And who is responsible for such use.

21—Is it not true that one of said machines was reconstructed with the addition of a second developing unit, including a tank, an extension of the main frame to support same, a set of driving rollers together with associated gears and shafts, and a set of idle rollers, duplicating the developing unit originally in the machine?

22—Is it not true that this second developing unit was added to accommodate the machine to the developing of negative film?

23—Did such changes improve the operation of the machine?

24—Did such changes adapt the machine for the performance of a function of which it was not theretofore capable?

25—What was that function?

26—When and by whom and at whose orders were such changes, referred to in interrogatory 21 made?

27—Has either defendant, within six years prior to the filing of this suit, either manufactured, or used or sold or leased a film developing machine or machines other than the two referred to in the preceding interrogatories? If so, please produce and file and serve a copy on plaintiff's counsel a drawing, cut or photograph of each of same.

NOTE: All of the foregoing interrogatories are to be answered separately by both defendants.

Los Angeles, California June 9 1930

Herbert A Huebner
Attorney for Plaintiff

[Endorsed]: Filed Jun 14 1930 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk

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[Title of Court and Cause.]

ANSWERS OF DEFENDANT, COLUMBIA PICTURES CORPORATION TO INTERROGATORIES PROPOUNDED BY COMPLAINANT.

Comes now the defendant, Columbia Pictures Corporation, a corporation, by Samuel J. Briskin, its assistant general manager, and for itself alone, answers the written interrogatories propounded by complainant, in the manner following:

ANSWER TO FIRST INTERROGATORY:

Yes. On or about August 27, 1929.

ANSWER TO SECOND INTERROGATORY:

Yes.

ANSWER TO THIRD INTERROGATORY:

Yes.

ANSWER TO FOURTH INTERROGATORY:

Since on or about August 27, 1929, Columbia Pictures Corporation has been a stockholder of Wm. Horsley Film Laboratories, Inc.

ANSWER TO FIFTH INTERROGATORY:

Joe Brandt—President

Harry Cohn—Vice President

Jack Cohn—Secretary and Treasurer

ANSWER TO SIXTH INTERROGATORY:

Harry Cohn—President

Jack Cohn—Vice President

Al E. Brandt—Secretary-Treasurer

ANSWER TO SEVENTH INTERROGATORY:

No.

ANSWER TO EIGHTH INTERROGATORY:

I am informed that this is true and I am also informed that Cinema Patents Company, Inc., is now the owner of the license and lease agreement and the machines mentioned therein and that Wm. Horsley Film Laboratories still uses said machines, pursuant to the terms of said license.

ANSWER TO NINTH INTERROGATORY:

I am informed that this is true.

ANSWER TO TENTH INTERROGATORY:

There is attached hereto and marked Exhibit "A", a photograph which I am informed truly and correctly il-

lustrates the said film developing machines, with this explanation: That the machine shown in the left hand part of the photograph is exactly the same as it was when originally installed and operated, and that the other machine was exactly like the one in the left hand portion of the photograph when the second machine was installed.

ANSWER TO ELEVENTH INTERROGATORY:

There is attached hereto and marked Exhibit "A" a photograph which I am informed truly and correctly illustrates both of the film developing machines as they were immediately prior to the filing of this suit and as they are now.

ANSWER TO TWELFTH INTERROGATORY:

I am informed that the machine shown in the left hand portion of Exhibit "A" attached hereto is the same as it was when originally installed. The machine shown in the right hand portion of said photograph, I am informed, correctly and truly illustrates the machine as it now exists with such additions as have been made upon it.

ANSWER TO THIRTEENTH INTERROGATORY:

I am informed, 265 feet in each machine.

ANSWER TO FOURTEENTH INTERROGATORY:

I am informed, 265 feet in the machine shown in the left hand portion of Exhibit "A" and 530 feet in the other machine.

ANSWER TO FIFTEENTH INTERROGATORY:

I am informed that additional rollers were placed on the machine shown in the right hand portion of Exhibit "A" and additional tank space or capacity was added to it so that the laboratory might be able to obtain a longer time in the development of the film.

ANSWER TO SIXTEENTH INTERROGATORY:

I am informed that these additional rollers and the additional tank capacity were added about June or July of 1929, upon order of William Horsley.

ANSWER TO SEVENTEENTH INTERROGATORY:

I am informed that they were.

ANSWER TO EIGHTEENTH INTERROGATORY:

I am informed that they are still operated for that purpose.

ANSWER TO NINETEENTH INTERROGATORY:

According to information which I have secured from Wm. Horsley Film Laboratories, Inc., this was approximately 20,231,823 feet.

ANSWER TO TWENTIETH INTERROGATORY:

I am informed that one of the machines—the one to which the additions were made—has been so used and Wm. Horsley Film Laboratories is, of course, responsible for such use, according to my information.

ANSWER TO TWENTY-FIRST INTERROGATORY:

I am informed that neither of said machines has ever been reconstructed, but I am also informed that certain additions were made to the one appearing in the right hand portion of the photograph marked Exhibit "A" and that the particulars mentioned in this interrogatory are substantially what was done in making that addition.

ANSWER TO TWENTY-SECOND INTERROGATORY:

This is not true, according to my information.

ANSWER TO TWENTY-THIRD INTERROGATORY:

No. I am informed that the operation of the machine has always remained the same.

ANSWER TO TWENTY-FOURTH INTERROGATORY:

I am informed that the function of the machine remained the same.

ANSWER TO TWENTY-FIFTH INTERROGATORY:

See answer to twenty-fourth interrogatory.

ANSWER TO TWENTY-SIXTH INTERROGATORY:

I am informed that about December of 1927, grooves were machined into the rollers so as to accommodate a smaller film and that in June or July, 1929, the addition referred to in the twelfth interrogatory was made, and I am informed that all of these additions were made upon order of William Horsley, who was general manager of the laboratory.

ANSWER TO TWENTY-SEVENTH INTERROGATORY:

No.

In giving these answers I wish to state that there is no officer of Columbia Pictures Corporation who has personal knowledge of many of the matters inquired into in these interrogatories, and I wish to state that I have conferred with William Horsley and with George Seid, William Horsley having been in charge of the laboratory up to the last of August, 1929, and George Seid having been in charge of it since that time, and I have visited the laboratory and inspected the machines and have had Mr. Seid point out to me the additions which were made in June or July, 1929, and which are described in the foregoing answers and, in giving these answers, by saying, "I am informed," I wish to state that my information has come from William Horsley and George Seid.

COLUMBIA PICTURES CORPORATION
By Samuel J Briskin
Assistant General Manager

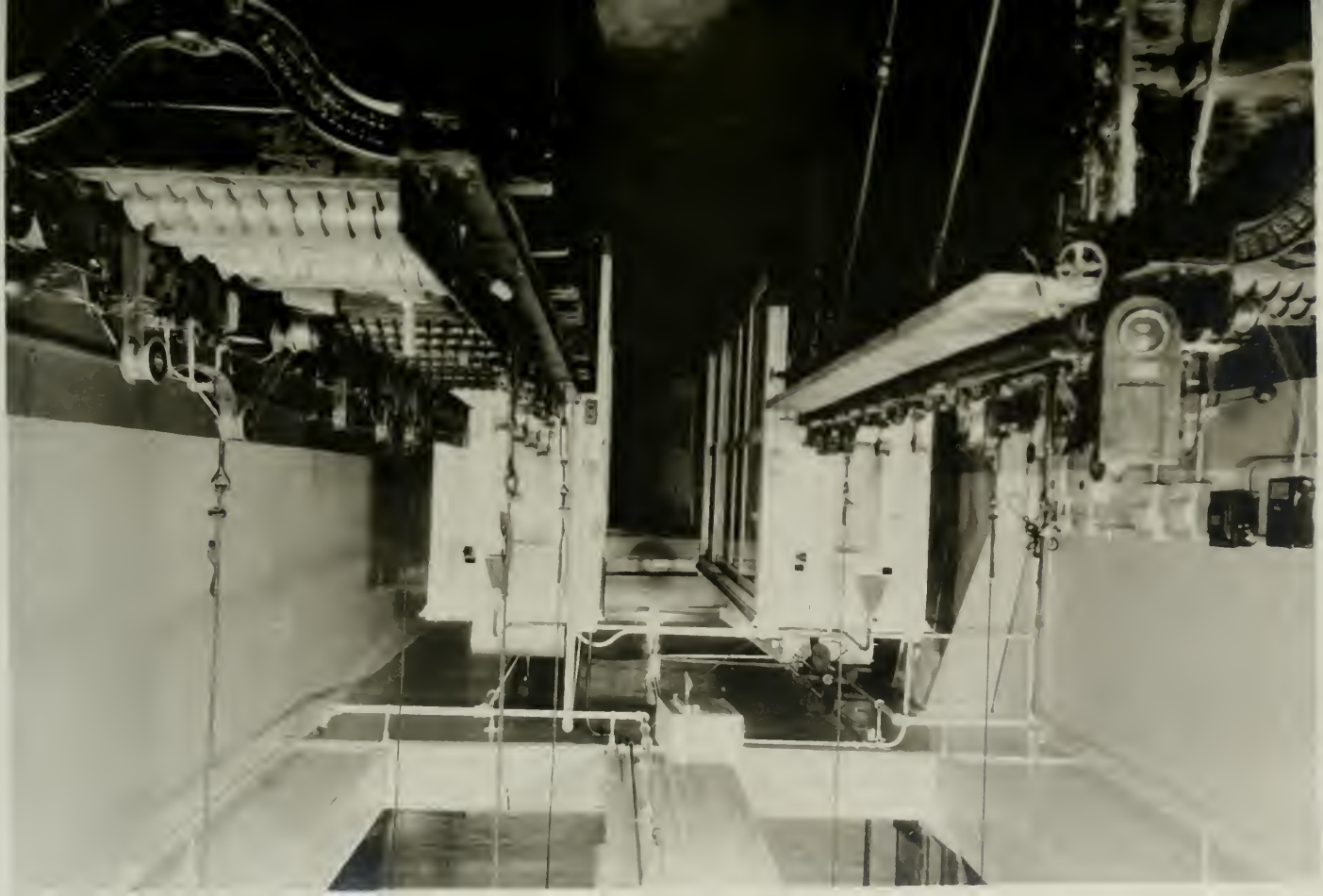
Subscribed and sworn to before me this 24th day of July, 1930.

[Seal] Loyd Wright,
Notary Public in and for said County and State

(Photo.)

[Endorsed]: Received copy of within Answers to Interrogatories this 25 day of July, 1930. Herbert A. Huebner by Robert M. McManigal Attorney for Plaintiff

Filed Jul 25 1930 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk



[Title of Court and Cause.]

ANSWERS OF DEFENDANT, WM. HORSLEY FILM LABORATORIES, INC., TO INTERROGATORIES PROPOUNDED BY COMPLAINANT.

Comes now the defendant, Wm. Horsley Film Laboratories, Inc., by Harry Cohn, its President, and for itself alone, answers the written interrogatories propounded by complainant, in the manner following:

ANSWER TO FIRST INTERROGATORY:

Yes. On or about August 27, 1929.

ANSWER TO SECOND INTERROGATORY:

Yes.

ANSWER TO THIRD INTERROGATORY:

Yes.

ANSWER TO FOURTH INTERROGATORY:

Since on or about August 27, 1929, Columbia Pictures Corporation has been a stockholder of Wm. Horsley Film Laboratories, Inc.

ANSWER TO FIFTH INTERROGATORY:

Joe Brandt—President

Harry Cohn—Vice President

Jack Cohn—Secretary and Treasurer

ANSWER TO SIXTH INTERROGATORY:

Harry Cohn—President

Jack Cohn—Vice President

Al E. Brandt—Secretary-Treasurer

ANSWER TO SEVENTH INTERROGATORY:

No.

ANSWER TO EIGHTH INTERROGATORY:

Yes, and William Horsley Film Laboratories, Inc., has continued to and still does use said two machines in its

laboratories and has paid royalties for the said use thereof, under said license.

ANSWER TO NINTH INTERROGATORY:

Yes.

ANSWER TO TENTH INTERROGATORY:

There is attached hereto, marked Exhibit "A", a photograph truly and correctly illustrating the two film developing machines as now installed and used in the laboratory. The left hand machine, as depicted and illustrated in said photograph, truly and correctly illustrates both of the machines as and when first installed and operated.

ANSWER TO ELEVENTH INTERROGATORY:

The photograph attached hereto and marked Exhibit "A" clearly and truly illustrates both of said machines as they were immediately prior to the filing of this suit.

ANSWER TO TWELFTH INTERROGATORY:

The machine shown in the left hand portion of Exhibit "A" attached hereto is the same as it was when originally installed. The machine shown in the right hand portion of said photograph has had added to it an enlargement of the developing tank, together with an extension of the main frame to support the same, a set of driving rollers, together with associated gears and shafts and a set of idle rollers. These were added in June or July of 1929, by order of William Horsley. In December of 1926 or January of 1927, a groove was machined in the rollers in the machine shown in the right hand portion of Exhibit "A" so as to accommodate a 16 M/M film, and this groove was machined there upon the order of William Horsley. Both of the matters herein referred to were done by Mr. Horsley as President and General Manager of the corporation.

ANSWER TO THIRTEENTH INTERROGATORY:

265 feet in each machine.

ANSWER TO FOURTEENTH INTERROGATORY:

265 feet in one machine and 530 feet in the other machine.

ANSWER TO FIFTEENTH INTERROGATORY:

Additional rollers were placed on the machine shown in the right hand portion of Exhibit "A" and additional tank capacity added to it so that we might be able to obtain a longer time in the development of the film.

ANSWER TO SIXTEENTH INTERROGATORY:

These additional rollers and the additional tank capacity were added in or about June and July of 1929, upon order of William Horsley.

ANSWER TO SEVENTEENTH INTERROGATORY:

Yes.

ANSWER TO EIGHTEENTH INTERROGATORY:

They are still operated for that purpose.

ANSWER TO NINETEENTH INTERROGATORY:

Prior to adding the rollers in June or July of 1929, there had been developed and processed on said machines approximately 20,231,823 feet. The answer to this question is in the knowledge of plaintiff, as this defendant has each month rendered an accounting to Chester Bennett Film Laboratories, to whom payment of royalties has been made.

ANSWER TO TWENTIETH INTERROGATORY:

The machine appearing in the right hand portion of Exhibit "A" has been so used to some extent. William Horsley Film Laboratories.

ANSWER TO TWENTY-FIRST INTERROGATORY:

It is not true that one of said machines was reconstructed. It is true that additions described in answer to twelfth interrogatory were made in June or July, 1929.

ANSWER TO TWENTY-SECOND INTERROGATORY:

No. The additions made were not originally made for that purpose.

ANSWER TO TWENTY-THIRD INTERROGATORY:

No. The operation remained the same.

ANSWER TO TWENTY-FOURTH INTERROGATORY:

No.

ANSWER TO TWENTY-FIFTH INTERROGATORY:

See answer to twenty-fourth interrogatory.

ANSWER TO TWENTY-SIXTH INTERROGATORY:

See answer to twelfth interrogatory.

ANSWER TO TWENTY-SEVENTH INTERROGATORY:

No.

In answer to the above interrogatories and in particular reference to all interrogatories beginning with No. 7, I have depended upon information given to me by William Horsley, who was the general manager of said Wm. Horsley Film Laboratories, Inc., prior to on or about August 27, 1929, and also upon information given to me by George Seid who has been superintendent of said laboratory since August, 1929.

WM. HORSLEY FILM LABORATORIES, INC.
By Harry Cohn
President.

Subscribed and sworn to before me this 24th day of July, 1930.

[Seal] Loyd Wright,
Notary Public in and for said County and State

[Endorsed]: Received copy of within Answers to Interrogatories this 25 day of July, 1930. Herbert A. Huebner, by Robert M. McManigal Attorney for Plaintiff

Filed Jul 25 1930 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk

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[Title of Court and Cause.]

NOTICE OF HEARING OF MOTION FOR ORDER REFERRING CAUSE TO MASTER

TO COLUMBIA PICTURES CORPORATION, a corporation, and WM. HORSLEY FILM LABORATORIES, INC., a corporation, Defendants, and to LLOYD WRIGHT and FRANK L. A. GRAHAM, Defendants' Attorneys:

You, and each of you, will please take notice that on Monday, September 15, 1930, at the hour of 10 o'clock A. M., or as soon thereafter as counsel can be heard, in the court room usually occupied by His Honor, Frank C. Jacobs, Federal Building, Los Angeles, California, we shall bring on for hearing Plaintiff's attached Motion for Order Referring Cause to Master.

Dated at Los Angeles, California, this 10 day of September, 1930.

Herbert A. Huebner
Robert M. McManigal
Robert M. McManigal,
Attorneys for Plaintiff.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

CINEMA PATENTS COMPANY, INC., a corporation,	)	
Plaintiff,	)	In Equity
vs.	)	No. R-83-J.
COLUMBIA PICTURES CORPORATION, a corporation, and WM. HORSLEY FILM LABORATORIES, INC., a corporation,	)	
Defendants.	)	

MOTION FOR ORDER REFERRING CAUSE TO MASTER

Now comes Cinema Patents Company, Inc., a corporation, plaintiff, by its attorneys, Herbert A. Huebner, Esquire, and Robert M. McManigal, Esquire, and, under the provision of Federal Equity Rule 59, and the practice of this Court, moves that this cause be referred to David B. Head, Esquire, as Special Master for trial.

In support of this motion we shall rely upon the papers and pleadings on file in this cause, upon the annexed Points and Authorities, and upon the annexed Affidavit of M. J. Siegel.

Dated at Los Angeles, California, this 10 day of September, 1930.

CINEMA PATENTS COMPANY, INC.,
a corporation,

Plaintiff,

By Herbert A. Huebner
Robert M. McManigal
Robert M. McManigal.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

CINEMA PATENTS COMPANY, INC., a corporation,	)	
Plaintiff,	)	In Equity
vs.	)	No. R-83-J
COLUMBIA PICTURES CORPORATION, a corporation, and WM. HORSLEY FILM LABORATORIES, INC., a corporation,	)	
Defendants.	)	

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiff, at the hearing of the foregoing motion, will rely upon the following:

Hopkins Federal Equity Rules, 6th Edition, Equity Rules 49 and 59, Notes appended thereto and cases cited.

Los Angeles Brush Manufacturing Corp. vs. James, 272 U. S. 701, 47 S. Ct. 286, 71 L. Ed. 481.

Neale v. McCormick, 19 Fed. (2d) 320, (C. C. A. 9).

Holt Mfg. Co. v. C. L. Best Gas Traction Co., 245 Fed. 354 (D. C. Cal.)

Hy-Lo Unit and Metal Products v. Potter Radiator Co., In Equity M-62-J.

Beissel v. Brenneis, In Equity M-20-H.

Herbert A. Huebner
Robert M. McManigal
Robert M. McManigal,
Attorneys for Plaintiff.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

CINEMA PATENTS COMPANY, INC., a corporation, Plaintiff, vs. COLUMBIA PICTURES CORPORATION, a corporation, and WM. HORSLEY FILM LABORATORIES, INC., a corporation, Defendants.	In Equity No. R-83-J

AFFIDAVIT OF M. J. SEIGEL IN SUPPORT OF MOTION FOR REFERENCE TO SPECIAL MASTER.

COUNTY OF NEW YORK)
: SS:
STATE OF NEW YORK)

M. J. SIEGEL, being first duly sworn, deposes and says as follows:

I reside at 1515 President Street, Brooklyn, New York, and am president of Cinema Patents Company, Inc., plaintiff in this cause.

Cinema Patents Company, Inc. was incorporated in the State of New York on February 20th, 1930 and has ever since maintained an office in New York City.

Its principal business is manufacturing, owning and leasing motion picture film developing machines and re-

lated equipment, and holding patents covering same. Its principal revenue is derived in the form of rentals and royalties paid by laboratories and producers using the Cinema patented machines.

Shortly after its incorporation, Cinema launched this program and acquired ownership of a valuable group of patents, including the two patents here in suit, and a large number of developing machines already located in commercial laboratories and producers laboratories in New York, Chicago, and Los Angeles, as well as sufficient manufactured parts to construct additional machines. Cinema also succeeded by assignment to the rights of the lessor and licensor under numerous agreements including the right to receive rentals and royalties for the use of the machines as covered by the patents.

The investment made by Cinema from the time of its incorporation to date in the patents, the machines and contracts has been substantially over Seven Hundred and Fifty Thousand ($750,000.00) Dollars.

The patents in suit are two of the principal patents included in this purchase. One of them, Gaumont No. 1,177,697, granted April 4th, 1916 expires in less than three years and the other, Thompson No. 1,281,711, granted October 15th, 1918 has only five years to run.

The alleged infringing machines are not owned by the defendants but are owned by the plaintiff and were originally leased to the defendant, Wm. Horsley Film Laboratories, Inc., considerably prior to the incorporation of the plaintiff, and were acquired by the plaintiff as indicated.

The machines, as constructed and installed, were equipped for developing 35 milimeter positive film and were intended only for that use.

Without the consent of the owner of the machines and patents, the defendants, or one of them, re-constructed both machines so that one is equipped to develop 16 milimeter film as distinguished from 35 milimeter film, and the other is equipped to develop negative film as distinguished from positive film. Neither machine was suitable for these new uses in their original condition.

I am informed and believe that the defendants have used these machines since re-constructing them to develop 16 milimeter film and negative film in addition to 35 milimeter positive film.

It is the plaintiff's practice to furnish different types of machines for these different uses and to lease and license them on a different basis. With the exception of the defendants, all licensees pay a much higher royalty on negative film processed than on positive film.

The territory allotted by the plaintiff under the patents is specific to the use of a particular machine or machines for processing a specific size or type of film and the defendants, by re-constructing the machines and using them in the manner described, have broken into plaintiff's business, deprived it of revenue, and are encouraging plaintiff's other licensees to likewise infringe. Because of this fact, mere recovery of damages or profits will not be adequate and an injunction is necessary to give the plaintiff the relief which is needed. Unless that injunction is granted at an early date the value of plaintiff's large investment will be materially impaired.

The suit was promptly filed and has been at issue since July 25th. I am informed and believe that the condition of the Court calendar is such that the Court cannot possibly try the case this year and the probability of a trial during the first six months of next year is remote.

Uncertainty and delay such as that will work irreparable hardship upon the plaintiff, as only an injunction can give adequate relief, and a long delay in the trial of the case may cause the litigation to survive one or both of the patents. Neither of them have been adjudicated.

I am advised that the Special Master usually appointed by this Court has an open calendar, allowing a wide selection of dates for the trial of this case if reference is made, and under the exceptional circumstances, it appears to me that a reference is essential.

M J Siegel

Sworn to and subscribed before me this 6th day of September, 1930.

[Seal] Edith M. Coltart
Notary Public New York County
NOTARY PUBLIC, New York County
N. Y. County Clk's No. 164, Reg. No. 2C181
Commission Expires March 30, 1932

[Endorsed]: Received copy of the within Notice, etc this 10 day of Sept 1930 Loyd Wright Attorney for Defendants

Filed Sep 10 1930 R. S. Zimmerman, Clerk By Murray E Wire Deputy Clerk

[Title of Court and Cause.]

ORDER REFERRING CAUSE TO MASTER

This cause coming before the court at this time for Order Referring Cause to Master; Robert M. McManigal, Esquire, appearing as counsel for Plaintiff, and Charles E. Millikan, Esquire, appearing as counsel for the Defendants; and it appearing that because of the confusion of the court's calendar there are many other causes entitled to be first heard, including a large number of criminal cases, which are entitled to preference over civil matters as to the trial thereof; and it appearing that Judge James had already filled all available dates for the entire September term before calling the regular September term trial calendar, thereby causing the continuance of all cases on said calendar; and it further appearing that, because of the protracted length of the patent trials, the result has been, and is, that other civil litigants having causes to be tried have not been accorded a fair portion of the time of the court; and it appearing that this condition will continue unless many of the patent causes now pending can be disposed of in a manner herein provided; and, hence, that in order to fairly and within a reasonable time dispose of the business before the court, it is necessary that this order be made:

IT IS NOW ORDERED, that this cause be referred to David B. Head, Esquire, a Special Master, to take and hear the evidence offered by the respective parties and to make his conclusions as to the facts in issue, and recommend the judgment to be entered thereon; the Special Master is authorized and empowered to do all things and to make such orders as may be required to accomplish a

full hearing on all matters of fact and law in issue in this cause. The objection of counsel for Defendants to the making of this order referring the cause to the Master is hereby noted and exception is allowed in favor of the Defendants.

Dated this 26th day of September, 1930.

F. C. Jacobs
District Judge.

Approved as to form:
Frank L. A. Graham
Attorney for Defendants.

[Endorsed]: Filed Sep 26 1930 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk

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[Title of Court and Cause.]

STIPULATION CONTINUING TIME FOR TAKING DEPOSITIONS.

It is stipulated by the parties hereto, through their respective attorneys, that the time for commencing the taking of depositions of M. J. SIEGEL, R. C. HUBBARD, MEYER H. LAVENSTEIN and H. J. YATES, JR., heretofore noticed for November 7th, 1930 at 10 o'clock, may be and hereby is continued to Tuesday, November 18th, 1930 at 10 o'clock A. M.

Dated the 1st day of November, 1930.

Herbert A Huebner
Attorney for Plaintiff
Nathan Burban
Attorney for Defendants

[Endorsed]: Filed Dec. 8, 1930 R. S. Zimmerman, Clerk, by M. L. Gaines, Deputy Clerk.

[Title of Court and Cause.]

STIPULATION CONTINUING TIME FOR TAKING DEPOSITIONS.

It is stipulated by the parties hereto, through their respective attorneys, that the time for commencing the taking of depositions of M. J. SIEGEL, R. C. HUBBARD, MEYER H. LAVENSTEIN and H. J. YATES, JR., heretofore noticed for October 29th, 1930, may be and hereby is continued to Friday, November 7th, 1930 at 10 o'clock A. M.

Dated the 29th day of October, 1930.

Herbert A Huebner
Herbert A. Huebner
Attorney for Plaintiff
Nathan Burban
Attorney for Defendants

[Endorsed]: Filed Dec. 8, 1930 R. S. Zimmerman, Clerk, by M. L. Gaines, Deputy Clerk.

[Title of Court and Cause.]

NOTICE OF TAKING DEPOSITIONS

TO THE ABOVE NAMED DEFENDANTS AND TO LOYD WRIGHT, CHARLES E. MILLIKAN AND FRANK L. A. GRAHAM, ESQUIRES, THEIR ATTORNEYS: You and each of you will please take notice that pursuant to the provisions of 28, U. S. C. 639, the depositions of the following named witnesses, and possibly others, all of whom reside more than one hundred miles from the place of trial of this cause, will be taken before Herman Schlesinger, or other notary public, in the office of H. A. Huebner, 20th floor of 1776

Broadway, New York, N. Y., on Wednesday, the 29th day of October, 1930, commencing at the hour of 10 o'clock A. M., and continuing from day to day until completed:

M. J. Siegel, residing at 1515 President Street, Brooklyn, N. Y.

R. C. Hubbard, residing at 669 South 5th Avenue, Mt. Vernon, N. Y.

Meyer H. Lavenstein, residing at 14 Schuyler St., New Rochelle, N. Y.

H. J. Yates, Jr., residing at 6960 Continental Avenue, Forest Hills, L. I., N. Y.

Herbert A Huebner
Herbert A. Huebner

.....

Robert M. McManigal
Attorney for Plaintiff

ORDER

GOOD CAUSE APPEARING THEREFOR, it is hereby ordered that the plaintiff be permitted to take depositions under the provisions of 28, U. S. C. 639, as set forth in the foregoing notice.

Wm P James
United States District Judge

Receipt of Notice of Taking Depositions acknowledged this 22nd day of October, 1930 C E Millikan Atty for Defendants Filed Dec 8 - 1930 R. S. Zimmerman, Clerk By M L Gaines Deputy Clerk

(Testimony of Arthur Barsam)

[Title of Court and Cause.]

CONDENSED STATEMENT OF THE EVIDENCE

Mr. Huebner and Mr. Graham stipulated that each party would advance one half of the Master's fees, and one half of the reporter's fees for the Master's copy of the minutes, both fees to be eventually charged as costs.

Mr. Huebner offered in evidence the following patents, which were received and marked as exhibits, to-wit:

U. S. Letters Patent No. 1,177,697 granted April 4, 1916 to Leon Gaumont, Plaintiff's Exhibit No. 1.

U. S. Letters Patent No. 1,281, 711 granted October 15, 1918 to Frederick B. Thompson, Plaintiff's Exhibit No. 2.

Barsam direct

ARTHUR BARSAM,

called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HUEBNER:

My name is Arthur Barsam, I am over 21, live at 1726 West 37th Drive, Los Angeles, and am a tool and die maker. I was subpoenaed to appear here today. I have a machine shop in Hollywood. At times I have done work for the William Horsley Film Laboratories, and the Columbia Pictures Corporation upon motion picture film developing machines. I have visited the laboratory of the William Horsley Film Laboratories, on Sunset Boulevard, at Hollywood; and whenever they asked me to I examined the motion picture film developing machines

(Testimony of Arthur Barsam)

they have there. I *ya* have seen them, from time to time, over a period of about six years. Prior to June 1st of this year, there were two film developing machines, to my knowledge, in the Horsley Laboratories in Hollywood. On the two machines we did repairing now and then, parts worn out or broken down, that Mr. Horsley used to bring down to us. We had to copy them from the parts we had, and make them accordingly. We made gears, and lead weights, and repaired worn down rollers. We had to scrape them off and recut the grooves.

During the summer months of 1929, we had one job there that run a few days, and that was, Mr. Horsley himself added a tank on the rear end of the machine, of one of them. We made some parts, so as to make it come into a little longer machine than what they had before. We did not build the tank. We copied the gear box he had and made the gears similar to what they had on there, composition as well as brass, and some composition like babbit, that goes on the bottom of the tank that holds the bearings, so as to center the rollers on there. That is about all I know. We made two rollers, I believe, composition, similar to the ones he had. I didn't personally install these parts that I made up. My helpers did it. I couldn't tell you their names. I had so many that come and go. They did it under my instructions. I didn't see the machine after these new parts had been put on. My partner went there. My partner is Mr. Tollar. Our shop also did some machining of grooves in the rollers. We simply bought the material and copied what he had. We did all this work under instructions from Mr. Horsley, and furnished the parts that we made up to the Horsley Laboratories—machined the parts for him, and bought the material. Sometimes he bought the material himself. We were operating independently, but not under contract with them; it was time and material.

MR. GRAHAM: No cross-examination.

(Testimony of James A. Tollar)

Tollar Direct

JAMES A. TOLLAR,

called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HUEBNER:

My name is James A. Tollar, I live at 1962 North New Hampshire, Hollywood, and am a machinist; partner of Mr. Barsam who just left the witness stand. I am personally familiar with the developing machines in the Horsley Laboratories in Hollywood. They had two of them there, up to June of this year. Before June of this year we extended one tank. When I say "we", I mean the machine shop. I heard the description Mr. Barsam gave. His description of the parts that we made and furnished to the Horsley Laboratories is correct. I have nothing to add to what he said. I saw the machine upon which these new parts went, and had seen it prior to the time the new parts were put on.

MR. HUEBNER: At this time, before further questioning the witness, I wish to offer in evidence the plaintiff's interrogatories, and the answers of both defendants to the interrogatories.

THE MASTER: All right. They will be considered in evidence. I don't think they need to be given a designation.

THE WITNESS RESUMES:

Referring to the photograph designated as Exhibit A, attached to the answers to the interrogatories, that appears to me to illustrate the machines in the laboratory.

(Testimony of William Horsley)

Those machines are not both in the condition that they were in when I first saw them; one has one tank additional; that is all. When I first saw them, they were both the same size, as to units. The original machine is on the left side, looking direct at the picture, and the machine on the right is the one that had the extra tank added to it. The function of that extra tank and the rollers and gears associated with it is to develop. Our shop machined some grooves in the additional rollers what we made. I don't remember the width of those grooves that we machined in those rollers.

I think it was in June, 1929, that we did this work for the Horsley Laboratories relating to the additional unit on the machine. Since that time we have done nothing except repairs, just a broken down gear, or something like that, worn out parts; never more than one or two pieces at a time.

MR. GRAHAM: No cross examination.

Horsley Direct

WILLIAM HORSLEY,

called as witness on behalf of Plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HUEBNER:

My name is William Horsley, I am past 60, my residence is at 6075 Sunset Boulevard, Hollywood. My occupation is that of motion picture laboratory proprietor. I *I* am not now an officer of the defendant William Horsley Laboratories, Incorporated; up until August, 1929, I was president of the company. I have not held any office

(Testimony of William Horsley)

since that time, in the William Horsley Laboratories. At the time I was president of the Laboratories, Columbia Pictures, Incorporated, had no interest in the Horsley Laboratories. They later acquired complete ownership. I don't remember the exact date when that happened. I think it was in August, 1929. I was president or some other officer of the Horsley Laboratories from the day that it was organized, some time early in 1924 until August 1929.

I am, of course, familiar with the developing machines in that laboratory. I operated them.

"Q When those machines were originally acquired and installed in the laboratory what sized film were they adapted and intended to develop?

A Intended to develop any kind of film that I chose to put on them."

The machines were equipped originally for developing a certain width of film, 35 millimeters. I did develop 35-millimeter film on both of those machines for about one year. 35-millimeter film is commonly referred to as standard width motion picture film. After the first year I adapted one of the machines to develop 16-millimeter film. I made that adaptation by cutting the grooves 16 millimeters wide in the middle of the rollers. The rollers were originally grooved for a clearance of 35 millimeter film.

"Q Do those grooves, for the accommodation of 16-millimeter film, show in the photograph annexed to the answers to the interrogatories?

A These rollers are grooved for 35, that are in here now. I would like to correct the previous statement,

(Testimony of William Horsley)

where I said I altered two machines. I only altered one. One machine was the only one that was changed to 16.

Q Do the 16-millimeter grooves show in the one machine you altered?

A No.

Q Can you see them in the picture?

A The grooves that show on there are Universal Roller. The company that I had the contract with refused to let me have repair parts, and I had to purchase them from the Universal Film Company. Consequently they don't show the same type of groove."

The machine on the right is the one which was altered. I can't say whether the rollers in that machine shown on the right side of the picture are provided with the 16-millimeter grooves; I haven't seen those machines for more than a year. When I last saw them, some of the rollers were. It made no difference whether you put 35 or 16 through on the same rollers. The laboratory developed 16-millimeter film on these machines after they had been grooved for the 16-millimeter work. The development of 16-millimeter film on that machine amounted to millions of feet of film; it was practically 90 per cent of my business. The 16-millimeter, for the last three years Most of the grooves in the rollers were machined by the machine shop where the machines were made, the Chester Bennett Laboratories, at my instructions.

In 1929 there were some further changes made on the machine. We added one more section to the developing end of one of the machines. The parts that went into that additional developing section were identically the same as the ones in the machine. We made or acquired

(Testimony of William Horsley)

parts, and duplicated the developing tank that was already in the machine; and used both developing sections after we had the new section added; developed several thousands of feet of 35-millimeter film on the machine that we changed by adding that section to.

The function of that additional developing section was to give us a longer period of development. It was customary in developing practice to give negative film the equivalent of four times as much developing time as positive film. We did not make any changes in the dryer of that machine. The machine on the right side of the photograph is the one that was changed. At the time I sold to Colbia Pictures I was operating that changed machine with the addition of the developing unit for developing negative film.

Horsley Cross

CROSS EXAMINATION

BY MR. GRAHAM:

The machine on the left-hand side of the picture has never been used for developing negative film nor has it been used for 16 millimeter. These different uses of machines which I had in the laboratory for developing a smaller width film and also negative film were solely on the one machine. I referred to having certain changed rollers cut down in size by the concern that built these machines. That was the Chester Bennett Film Laboratories. They installed them. That work was done under a contract which I had with them. This instrument in writing which you have shown me is the contract I referred to. That is my signature. James is the man that owned the laboratory and Mr. Thompson and his wife.

(Testimony of William Horsley)

Referring to this Fred B. Thompson whose signature appears on here, I recognize him in the courtroom. He is sitting there in the chair, the inventor of the machine. This is the agreement under which those machine were installed in our laboratory and operated.

MR. GRAHAM: We offer in evidence this license agreement identified by the witness as Defendants' Exhibit A, and ask leave of court to substitute for this original contract a copy.

MR. HUEBNER: There is no objection to the copy.

THE MASTER: There is a copy marked Exhibit A attached to the answer of the Columbia Pictures Corporation; and I will mark it in this case as Defendants' Exhibit A.

(Defendants' Exhibit A.)

WITNESS RESUMES:

After entering into this agreement and having the machines installed, I paid 25 cents per thousand feet royalty. I continued to pay royalty after these changes were made that I have testified to, which converted one machine into a 16 millimeter machine. Every month they got a return. And those royalties were accepted by the parties to the contract that put the machines in our laboratory. We paid royalty on the 16-millimeter film that was run through the machine from about the month of March, 1926, until the end of August, 1929. The method employed for developing this 16-millimeter film is absolutely the same as that used for developing the 35-millimeter film. The method employed for developing negative film is the same as that employed for developing positive film.

(Testimony of William Horsley)

except for the longer period of time required for developing the negative. So far as the operation of the machines is concerned they are identical. The changing of the rollers so that we could use the one machine for developing 16-millimeter film was done in the shop of one of the parties to the contract, the Chester Bennett Laboratories.

When we were about to make this other change which I have testified to, that is, the addition of the developing tank to the one machine, I requested the Chester Bennett Laboratories to furnish me with parts. They told me to write a letter on it. I wrote a letter making the request but they never answered it; and they positively refused to let me have parts. The Chester Bennett Laboratories previous to my requesting these parts had been sold out to the Consolidated Film Industries, and they were the ones that refused to furnish me with the parts.

Horsley Redirect

REDIRECT EXAMINATION

BY MR. HUEBNER:

I have no copy of that letter I say I wrote asking for these parts. I left it in the office of Mr. George K. Spoor a year ago last November. I do not remember the date of the letter. It was about the month of May, 1929. In the letter I asked them to furnish me one extra section for my developing machine and also to state the price they would charge me. I told them I wanted to make the machine, or one section, longer to develop negative. I think I stated that in the letter, although I am not positive of it. Anyway, I made it clear to them that I wanted to put on another section on the developing end of the machine so that I could develop negative film. I received

(Testimony of William Horsley)

no reply to the letter. They ignored me completely. I wrote the letter to the Chester Bennett Laboratories. They were operating as the Chester Bennett Laboratories, Mr. George Yates, manager.

I accepted their failure to answer this as a refusal to furnish me those parts, and went ahead and had the parts made outside, by Barsam and Tollar. I got the tank from the Pacific Tank & Pipe Company. I did not obtain any of the parts from the Chester Bennett Film Laboratories.

I did not write any letter to the Chester Bennett Film Laboratories advising them of the changes that I had made.

Prior to the time that I changed this machine over I had not developed negative film on either of those two machines; I had, however, developed positive film on both machines, running into the millions of feet. The machines had at all times operated satisfactorily in the development of positive film. I was quite enthusiastic about their operation, and I am yet.

The change I made was not to improve the operation of the machine so far as the development of positive film was concerned. It was for the purpose of making the machine so that I could develop negative on it, and for that purpose only. The developing machine that was altered was used to develop negative film immediately after it was reconstructed, and was used more or less continuously for that purpose until I sold the laboratory.

(Testimony of William Horsley)

Horsley Recross

RECROSS EXAMINATION

BY MR. GRAHAM:

We paid royalties on the negative after we changed the one machine to handle negative.

The machine which has not been changed or which has not been made so that it would handle negative film, can develop negative film. Mr. Thompson, the inventor of the machine, had access to the laboratory at all times and used to visit us about every two weeks, and knew what was going on at all times. Mr. Thompson was one of the parties to the contract and the inventor of the machine. He had no connection at that time with the Bennett Film Laboratories. At the time of building the machines he had been the supervisor of the machine shop.

Horsley Redirect

REDIRECT EXAMINATION

BY MR. HUEBNER:

Royalty payments were made by the laboratory after the development of negative film was begun only for the month of July and the month of August, 1929, to my personal knowledge. Those payments were based on the same rate of royalty per foot as we had theretofore paid for developing positive film, 25 cents per thousand. Those payments were made by check to the Chester Bennett Film Laboratories. No report accompanied the checks except the number of feet, I believe, that the royalties called for; just the number of feet of film developed at 25 cents per thousand and the check for the amount that we computed. That was all that went with the check. In those reports we combined the total footage of both negative and positive, as "motion picture film," and we didn't specify whether it was negative or positive.

(Testimony of George Seid)

Seid Direct

GEORGE SEID,

called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HUEBNER:

My name is George Seid; my age 40 years; I live at 542 North Fuller, Hollywood; a laboratory technician for Horsley Film Laboratories. I am the superintendent of that laboratory, having occupied that position since the 1st of September, 1929.

The Horsley Laboratories, defendant in this case, developed negative motion picture film in its laboratory between the time I went there and the 1st of June, 1930, by the use of a developing machine. There were two developing machines in the laboratory during that period, and we used both of them for the development of negative film.

I am familiar with the machines in the laboratory. The photograph annexed to the defendants' answers to interrogatories, is a true and correct illustration of the machines that were in use there prior to June, 1930. We developed negative film on the machine shown on the left-hand side of the picture in exactly the same maner as the other side, only that one took a shorter time of development than the other. Either side could be adapted, or could be used, for developing negative film.

Q But I asked you if the one on the right-hand side of the picture is not better suited for developing negative film than the one on the left side of the picture.

A Just that it takes you a longer time of development.

(Testimony of George Seid)

Q And for that reason it is better suited, isn't it?

A Not necessarily.

Q How long a developing time did you allow for the development of negative film in the machine on the left side of the picture?

A Between four and five minutes.

Q And how long a time did you allow in that same machine for the development of positive film?

A About three minutes or three and a half minutes.

Q How much negative film did you develop in that machine on the left-hand side of the picture during that time?

A Oh, I would say an average of about six to ten thousand feet a night.

Q And how much in the machine on the right side of the picture?

A Approximately the same.

Q During what period did that occur?

A Since we have been operating the plant; since the 1st of September until the present time.

Q When you say "since we have been operating the plant" whom do you mean by "we"?

A The Horsley Film Laboratories.

Q. What developing time did you allow for the development of film in the machine on the right side of the picture?

A Anywheres between seven and ten minutes.

Q Did you use the same developing solutions in both machines for negative work?

A The ingredients were the same but were of different proportions.

(Testimony of George Seid)

Q In other words, you had a much stronger solution in the machine that had only one tank, didn't you?

A No. They were practically the same as to actual strength. They were being used for a different result in the negative.

Q What type of negative did you develop in the positive machine?

A One known as a sound track.

Q. Not a picture negative?

A No; it didn't have a picture but it had an exposure.

Q For the benefit of the court and to preserve the record, explain the difference between a picture negative and a sound track negative.

A The sound track negative is an exposure placed upon film through a recording device. Picture negative is an exposure placed upon film through a camera.

Q And contains images of action?

A It contains images of action.

Q And the sound track negative contains a strip along the edge of the film representing visually sound waves?

A That is correct.

Q The development of a sound track negative ordinarily and commonly requires less time than the development of a picture negative, does it not?

A It does with us.

Q And in that respect it more nearly resembles positive film?

A You couldn't give it the same treatment as you give positive film. It requires a special and entirely different solution to develop the sound track than it would positive film.

(Testimony of George Seid)

Q But the time of development is approximately the same as for positive film, isn't it?

A It runs closer to that range; yes.

Q And all your picture negative has been developed in the machine which has the additional developing unit included, is that true?

A That is true.

That negative machine, being the one on the right side of the photograph, was in use by the defendant for developing negative film at the time this suit was commenced in June of 1930. The Horsley Laboratory has used that machine for that purpose since the filing of this suit and is now using it for that purpose.

Seid Cross

CROSS EXAMINATION

BY MR. GRAHAM:

I referred to the machine on the right-hand side of the photograph as having an additional developer tank. Assuming that that partition between the two developer tanks was removed, you would in fact have a single developer tank. I have seen machines of the Spoor-Thompson type where they had a longer wet end and a longer drying space than the machines of the Horsley Laboratories. By a longer wet end I mean additional tanks carrying added solutions. They were Spoor-Thompson machines.

Basing my answer on my experiences in the development of motion picture film, I would say that that machine on the left-hand side of the photograph could be used for developing negative picture film without any change in the construction of it as it stands now.

(Testimony of George Seid)

Seid Redirect

REDIRECT EXAMINATION

BY MR. HUEBNER:

Assuming we attempted to develop picture negative in that positive machine, for one thing, we would have to concentrate our solution, known as the developing solution. We would have to have a stronger developing solution. We would increase the hardening qualities of the hypo and slow down the actual running of the machine. The machine has a speed change on it. We have run the machine as slow as 10½ minutes and we have run it as fast as 2 minutes.

Q It is considered better practice, however, is it not, to develop picture negative with a weaker solution and a longer period of time than with a strong solution for a short period of time?

A Well, that is just a matter of judgment on account of the nature of the work going through.

Q What I describe as more suitable—it has been the practice in your laboratory, hasn't it?

A I wouldn't say that. In the manner in which we are controlled, or control it, we could get our exposure handled in that manner which would adapt it to any speed of development we desired.

Q As a matter of fact, however, prior to the filing of this suit the defendant laboratory did not develop any picture negative in that positive machine, did it?

MR. GRAHAM: Just a minute. That is limited to the time that the witness was with the company?

MR. HUEBNER: That is understood.

Q And the answer is what?

(Testimony of George Seid)

A We never used that positive machine for negative developing of pictures.

Q Will you explain why you used the negative machine after its reconstruction for the developing of picture negative?

A So that we could retain a better rate of speed. Where the one would slow our speed down, we were taking advantage of that other tank and holding that speed up.

Q The quality didn't have anything to do with it?

A Well, of course, the quality naturally was in getting the advantage of it.

Q By the use of the negative machine?

A Yes.

Q The quality was improved?

A Yes.

MR. HUEBNER: That is all.

Seid Recross

RECROSS EXAMINATION

BY MR. GRAHAM:

Q But as far as the operation of these two machines is concerned they operate in the same manner, do they not?

A Yes, sir.

MR. GRAHAM: That is all.

MR. HUEBNER: I would like to ask counsel at this time whether they care to admit incorporation and citizenship of the plaintiff or whether I will have to offer in evidence a certificate of incorporation.

MR. GRAHAM: We will admit it.

(Testimony of George Seid)

MR. HUEBNER: I would like to call the Master's attention to the fact that title in the plaintiff in the patents in suit is admitted in the answer.

I now offer in evidence the depositions of M. J. Siegel and R. C. Hubbard and the exhibits atttached thereo.

THE MASTER: Is there any objection?

MR. GRAHAM: No objection.

THE MASTER: They may be received.

MR. HUEBNER: The plaintiff rests.

MR. GRAHAM: We offer in evidence a certified copy of the first amended complaint in a suit in the Superior Court of the State of California in and for the County of Los Angeles, entitled Cinema Patents Company, Inc., a corporation, plaintiff, vs. William Horsley Laboratories, Inc., a corporation, defendant." I understand that you have stipulated that that suit is still pending. Is that correct?

MR. HUEBNER: Yes. I stipulate that suit is pending.

MR. MILLIKAN: It is at issue.

THE MASTER: That will be Defendants' Exhibit B.

(Defendants' Exhibit B.)

MR. GRAHAM: We offer in evidence a patent to Frederick B. Thompson, No. 1,328,464, issued on the 20th of January, 1920, which is referred to and is a part of the license agreement.

THE MASTER: Defendants' Exhibit C.

(Defendants' Exhibit C).

MR. GRAHAM: Also a copy of a patent to Frederick B. Thompson, No. 1,260,595, issued on the 26th day of March, 1918. That is another patent under license.

(Testimony of George Seid)

THE MASTER: Defendants' Exhibit D.

(Defendants' Exhibit D.)

MR. GRAHAM: And a patent to Frederick B. Thompson, No. 1,299,266, issued on the 1st day of April, 1919.

(Defendants' Exhibit E.)

MR. GRAHAM: And also a patent to Frederick B. Thompson, No. 1,569,156, issued on the 12th day of January, 1926. And it shows on the face of the patent, "This patent was issued on an application filed February 9, 1924, Serial No. 691,633," identified in the license agreement.

(Defendants' Exhibit F.)

MR. GRAHAM: And a patent to Frederick B. Thompson, No. 1,587,051, issued on the 1st day of June, 1926, on an application filed February 9, 1924, Serial No. 691,634.

GEORGE SEID,

recalled as a witness on behalf of the Defendants, testified as follows:

DIRECT EXAMINATION

BY MR. MILLIKAN:

I am familiar with the license agreement which is in evidence as Defendants' Exhibit A, the license agreement between the William Horsley Film Laboratories and the Chester Bennett Film Laboratories, Frederick B. Thompson and Grace Seine Thompson. I don't know of any agreement between the William Horsley Film Laboratories and the Chester Bennett Film Laboratories with the Cinema Patents Company whereby the parties mutually consented to the termination of that agreement.

(Testimony of H. A. Huebner)

Seid Cross

CROSS EXAMINATION

BY MR. HUEBNER:

I am not an officer of either defendant corporation.

H. A. HUEBNER,

called as a witness on behalf of the Defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MILLIKAN:

On the 3rd day of May, 1930, I was an officer of the Cinema Patents Company, Incorporated, the plaintiff in this action, and have been such officer continuously since that time. I do not know of any agreement or mutual consent between the plaintiff in this action and the defendant William Horsley Film Laboratories, Inc., by the terms of which the license agreement which is in evidence as Exhibit A has been terminated, cancelled or annulled. I am assistant secretary of the corporation.

MR. GRAHAM: Defendants rest.

MR. HUEBNER: No rebuttal.

DEPOSITIONS of R. C. Hubbard and M. J. Siegel, taken at 1776 Broadway, New York, N. Y., on November 18th, 1930, at 10:00 o'clock A. M., pursuant to the attached notice and stipulation, before Arthur C. Smith, a Notary Public, New York County, New York.

(Testimony Roscoe C. Hubbard.)

APPEARANCES

HERBERT A. HUEBNER, (471 Chamber of Commerce Building, Los Angeles, California), Attorney for Plaintiff.

DANIEL V. MAHONEY, (165 Broadway, New York, N. Y.) Attorney for Defendants.

ROSCOE C. HUBBARD,

called as a witness on behalf of the plaintiff, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HUEBNER:

My name is Roscoe C. Hubbard; residence, 669 South Fifth Avenue, Mt. Vernon, New York; age, 52; occupation, motion pictures engineer, in which occupation I have been engaged for about twenty-five years. I am now employed by the Consolidated Film Industries, having been with that concern ever since the inception of the company, about six years ago, I think it is.

I started to design and build motion picture machinery at the beginning of my work, twenty-five years ago. The first machine I designed and built was a printing machine which was known as the Nestor Printer; after that, a numbering machine that printed the names on the edge of the film. After that a camera which was supposed to be a continuous camera and overcame the patents that were known as the Erb Camera. Later I designed a polishing machine, developing machines, printing machines and obtained patents on some of them. I am not a patent solicitor, but I have had occasion during my work as an engineer to read and consider United

(Testimony Roscoe C. Hubbard.)

States patents. I made a study of patents on film developing machines at one time; that is the only thing I went into to any extent.

MR. HUEBNER: I ask to have marked for identification a plain copy of the Gaumont Patent No. 1,177,697, granted April 4, 1916, for developing, fixing, toning and otherwise treating photographic films and prints.

(Marked Plaintiff's Exhibit No. 1 for identification.)

WITNESS RESUMES:

Referring to this Gaumont patent which is marked for identification Plaintiff's Exhibit 1, I have read and am familiar with it.

MR. HUEBNER: I will ask to have marked for identification the original United States Letters Patent No. 1,281,711, granted upon the application of Frederick B. Thompson, October 15th, 1918, for photographic film-treating apparatus.

(Marked Plaintiff's Exhibit 2 for identification.)

Q11 Have you read and are you familiar with the Thompson patent 1,281,711, Plaintiff's Exhibit 2 for identification?

A Yes.

MR. HUEBNER: Will you stipulate permission for me to withdraw the original by substitution of printed copies later?

MR. MAHONEY: I will so stipulate.

MR. HUEBNER: I ask to have marked for identification the answers of defendant William Horsley Film Laboratories to interrogatories propounded by plaintiff, a copy of which was served upon counsel for plaintiff.

(Marked Plaintiff's Exhibit 3 for identification.)

(Testimony Roscoe C. Hubbard.)

Q12 Referring to these answers of the defendant William Horsley to plaintiff's interrogatories, Plaintiff's Exhibit 3 for identification, have you examined the photograph attached to these answers marked "A"?

A Yes, sir, there are two Spoor-Thompson developing machines; one of which seems to be a positive machine and the other a sort of make-shift negative machine, I should say.

WITNESS CONTINUES:

My understanding of the Gaumont patent is that it is a machine consisting of vertical tanks and a mechanism to feed the film through in a spiral winding path. I understand the spiral is called helical. His description is very plain to me. The mechanism itself consists of two parallel shafts, one above and one in the lower portion of the tank, and he drives or pulls his film by means of toothed sprockets, the lower rollers being idle and the upper rollers being idle with the exception of the two end rollers, which have toothed sprockets. This machine was practicable and worked satisfactorily, but Thompson came to know, discovered a novel means of improving it. I should say that the first machine was slow in operation; the Gaumont machine was slow in operation. Thompson eliminated the toothed sprockets and drove by means of a friction take-up which operated slightly faster than the remaining mechanism, pulled the film into it, so that the rollers would drive. By this method he increased the speed of the machine approximately four-fold. The course of the film was similar in both of them; the film travels a spiral winding path. I have seen actual machines built in accordance with my understanding of the

(Testimony Roscoe C. Hubbard.)

Gaumont patent as well as the Thompson patent; and I have seen both the Gaumont and the Thompson machines in operation. I have seen and watched the operation of Thompson machines to a great extent. Gaumont I have seen in operation and I have examined the machines carefully, but I have not watched the operation for any length of time. I am familiar, however, with the mode of operation of both types of machine.

In answer to a previous question I stated that the photograph, Exhibit A, being a part of Plaintiff's Exhibit 3 for identification, shows one Spoor-Thompson machine for positive use and one for negative use. The reason I say one is a positive machine is because it has the regulation lay-out of the Spoor-Thompson machine for positive use. In observing the right-hand machine in the photograph I observe that additional rollers and tanks have been provided for developing, which leads me to believe that while it is not fully carried out as manufacturers do carry out a machine for negative, that this has been prepared for developing negatives.

The effect, in the treatment of film, of the additional tank that I observe in the machine on the right side of the picture is to allow the film to remain in the developing solution double the length of time that it would in the positive machine.

Comparing the machine on the right side of this photograph Exhibit A with the machine on the left-hand side of the photograph, I see in the machine on the right side additional idler rollers in addition to the frame welding which is plainly discernible, and there are undoubtedly driving rollers which cannot be seen, which must be

(Testimony Roscoe C. Hubbard.)

down in the bottom of the tank, vertical shafts which operate these driving rollers, also gear boxes, each set of rollers having to have a separate gear box.

I am familiar with the developing machine which the Cinema Patents Company, Plaintiff, manufactures and installs for the processing of motion picture film. Cinema Patents manufactures separate machines for positive and for negative developing. In the negative machines additional tanks are added for developer solution, additional rollers and mechanism are added to feed the film through these tanks; additional tanks are added for washing; additional rollers and mechanism are added for feeding the film through these washing tanks. Additional compartments are added to the dry chambers, in some cases.

As I see the machine shown on the left hand side of this picture "A", it is not suitable for developing negatives. The machine on the right side can be used for developing negatives. Quite an advantage in result would be obtained by the use of the machine on the right side of the picture for developing film over the use of the machine on the left side of the picture. That advantage would lie in the increased time in which film would remain in the developing solution. In order to obtain proper photographic quality in negative, it is necessary to develop at least three times as long as positive. In actual minutes, the developing time of negative and positive in motion picture laboratory practice is for positive an average time of four minutes; for negative an average time of twelve minutes.

The machine on the left side of the picture "A" is adapted to accommodate 35 millimeter film. The ma-

(Testimony Roscoe C. Hubbard.)

chine on the right side of the picture is adapted to accommodate 16 millimeter film, and 35 millimeter film; the 35 millimeter rollers are grooved out in the center, so that they are the proper width to take 16 millimeter film.

Hubbard Cross

CROSS EXAMINATION

BY MR. MAHONEY:

Before I entered the employ of Consolidated Film Industries, I worked for Erbograph Laboratories; Crystal Film Laboratories before that. I designed machines referred to in my direct evidence both before and after I was employed by Consolidated. I first saw a Gaumont machine in operation approximately ten years ago. I had seen film developing by machine before that time, by the Erbograph machine. That was not generally similar to a Gaumont machine. It had means for feeding the film, but it was a horizontal machine, not a vertical machine, quite different. I had seen film developed by hand. It was wound on racks; the racks were inserted in the tanks, and the film was allowed to remain in the tanks until it was developed. The film was wound on the racks by either turning the racks and the man winding it on manually, or we did have machines for winding it on. The position of the film on the racks after it had been wound on the racks was a spiral winding. It was customary to wind the film on the racks with the emulsion side uppermost. It was also customary in developing by hand to leave the negative films in the tanks a longer time than the positive films.

My study of patents has been mere reading of the patents and a study of the machines disclosed in the

(Testimony Roscoe C. Hubbard.)

patents. I would not attempt to pass on the scope of the claims of a patent, or any legal question of that character. My mind is not a legal mind at all. It is my understanding from an examination of this picture "A" of Plaintiff's Exhibit 3 for identification that the machines shown there were built by the Spoor-Thompson Company, they have the patent numbers on the front casting here, and they appear identical.

The normal daily output of a Gaumont machine as designed by Gaumont was about 10,000 feet, and the normal daily output of the Thompson machine is 40,000 feet. I first saw a Gaumont machine and a Thompson machine about ten years ago, both at about the same time. The Gaumont machine I saw in the Gaumont laboratories, in Flushing, Long Island; and the Thompson, if I remember rightly, I saw in the Universal Film Laboratories at Fort Lee, New Jersey.

In modifying the positive developing machine for use on negative film, you add additional tanks and the rollers or other parts normally associated with those tanks, and the driving mechanism. It is merely the addition of additional tanks and a battery of units. I could qualify that to some extent, because in a machine properly designed for negative, the designer takes other precautions, such as being able to run it by hand should the motor fail, and things of that sort. The developing time for both positive and negative films varies in different laboratories, and even varies in the same laboratories. It is a matter of density desired in the final film. There have been no changes in practice since sound track has been printed on film, respecting the time in which the film is developed.

(Testimony Roscoe C. Hubbard.)

The average practice is practically the same; it is pretty hard to change that. Any change in developing time in moving picture film equipped with sound tracks has been very slight. It is a matter of standardizing more than it is a matter of change. The variation is very much more limited than it was, but the general average would be about the same.

Hubbard Redirect

REDIRECT EXAMINATION

BY MR. HUEBNER:

I have seen and examined the developing machines in the Long Island laboratory of Paramount. Those machines are similar to the machines illustrated in the photograph "A" which is part of Plaintiff's Exhibit 3 for identification. I believe there are five positive machines which are similar to the one observed in the left hand side of the picture, and there is one negative machine there. That negative machine corresponds in the matter of number of developing tanks and the mechanism connected therewith with the machine shown on the right hand side of the photograph "A". The Consolidated Film Industries in the east here use three of these Spoor-Thompson machines at the New York plant and twelve at the Fort Lee plant, all positive machines. Consolidated has no Spoor-Thompson negative machines.

MR. *MR.* HUEBNER: I offer in evidence Plaintiff's Exhibits for identification Nos. 1, 2 and 3 respectively, as exhibits 1, 2 and 3.

(Plaintiff's Exhibits Nos. 1, 2 and 3 for identification were thereupon received in evidence.)

(Testimony of Morris J. Siegel)

Hubbard Recross

RECROSS EXAMINATION

BY MR. MAHONEY:

In testifying in regard to the photograph "A" which forms part of Plaintiff's Exhibit 3, I had not read the answers which constitute the remainder of Exhibit 3. I had not seen anything except the photograph. My answers to various questions are based solely on what I saw by an examination of that photograph.

Roscoe C. Hubbard

Subscribed and sworn to before me this 29th day of November, 1930.

Arthur C. Smith

Notary Public Queens County, New York Certificate filed in New York County, No. 1432.

MORRIS J. SIEGEL,

called as a witness on behalf of the plaintiff, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HUEBNER:

My name is Morris J. Siegel; age 33; address 1550 President Street, Brooklyn, New York; occupation, president Cinema Patents Company, Inc., which office I have held from the inception of the corporation. I believe it was organized on February 20, 1930. Its principal place of business is at 1776 Broadway, New York City. The principal business of the plaintiff company is to manufacture, lease and license developing machines, for the purpose of developing motion picture film. The plaintiff does include in its business some related equipment, but the principal business is the developing machine business.

(Testimony of Morris J. Siegel)

The plaintiff company owns Spoor-Thompson and Gaumont developing machine patents, relating to motion picture developing machines. These include the Gaumont patent 1,177,697 which is Plaintiff's Exhibit 1, and the Thompson patent 1,281,711 which is Plaintiff's Exhibit 2. These two patents were acquired by the plaintiff corporation on April 16th, 1930.

The revenue and income of the Cinema Patents Company is largely derived from royalties from the licensing of machines. The Cinema Patents Company paid for the group of patents that I have referred to as the Gaumont and Thompson patents, something in excess of $500,000. in cash. That represented the entire investment of the company so far as those patents were concerned, but not the full investment of the Cinema Patents Company in machines and equipment and patents. Subsequent to its incorporation, Cinema Patents Company acquired by assignment license and leasing agreements which the prior owners of the Gaumont and Thompson patents had with Paramount-Publix Corporation, H. E. R. Laboratories, Spoor-Thompson, and Eastman Kodak Company. Another license was concluded directly between Cinema and Consolidated Film Industries. I did not mention any lease with the William Horsley Laboratories, because we have considered the equivalent of no lease existing because of their breaching the lease. Cinema Patents Company regards the Horsley Laboratories as an infringer of the patents. The arrangement between Cinema Patents Company and Paramount-Publix with respect to ownership of the licensed machines is such that the ownership of the machines is vested in Cinema

(Testimony of Morris J. Siegel)

Patents, and the machines are leased to Paramount for the term of the agreement. The same is true in the H. E. R. Laboratories contract as in the Paramount-Publix lease. The same is true in the Consolidated Laboratories agreement with the exception, as I understand, Consolidated paid for some of the machines prior to our acquisition of the patents, which they would naturally own. There are fourteen Cinema owned machines in laboratories of Consolidated and used by Consolidated. In addition to those 14, Consolidated operates its own machines by virtue of license from Cinema Patents under the patents in suit. Consolidated pays royalty to Cinema on all machines it has; that is, the ones in which the title is vested in Cinema Patents and the one which they operate under royalty.

Paramount-Publix, H. E. R. Laboratories, Spoor-Thompson Company as well as Consolidated which I have already mentioned, pay royalties to Cinema Patents Company for the right to use the developing machines referred to. I am familiar with the books of the Cinema Patents Company; they are kept under my direction. The total amount of royalties received by Cinema Patents Company under the licenses and leases that we have been discussing, from the time Cinema acquired the Gaumont and Thompson patents down to and including the 31st of October, 1930, is approximately $250,000. I am not at liberty to disclose the rate of royalty which each one of those licensees pays to Cinema Patents Company. The Eastman Kodak Company does not pay the plaintiff any royalties under its license. By virtue of the agreement of the acquisition of the Gaumont patents, they had an

(Testimony of Morris J. Siegel)

exclusive use of the Gaumont machines for sixteen millimeter developing without any royalty payment to Cinema Patents. I believe Eastman Kodak Company pays royalty to prior owners of the Gaumont patents; at least I know that the agreements require them to.

These licensees that I have mentioned pay the plaintiff a different royalty per foot on negative film than they pay on positive film developed. It is more on the negative than it is on positive. That is true of all the licensees I have mentioned with the exception of the Eastman Kodak.

I am familiar generally with the Cinema developing machine which was formerly referred to as the Spoor-Thompson developing machine. I have seen them in operation. I have seen the machines that are in the H. E. R. Laboratories and those that are in the Paramount-Publix laboratory, also the machines that are in the Consolidated laboratories.

Q49 Will you please look at the photograph "A", which is a part of Plaintiff's Exhibit 3; do you recognize the subject of that picture?

MR. MAHONEY: Objected to on the ground the witness has not been properly qualified to answer the question.

A. Yes, I recognize them as two developing machines.

Q50 Are the developing machines in the Paramount-Publix laboratory, the H. E. R. laboratory and the Cinema machines in the Consolidated laboratory similar or dissimilar to the machines illustrated in the photograph "A"?

(Testimony of Morris J. Siegel)

MR. MAHONEY: My objection following the last question will be understood to be a continuing objection to all questions relating to comparisons between the various machines mentioned in this question and the machines shown in the photograph.

A They are the same.

Siegel Cross

CROSS EXAMINATION

BY MR. MAHONEY:

Cinema Patents Corporation obtained title to the Thompson and Gaumont patents from the Spoor-Thompson Company. The license agreement between William Horsley Laboratories and some owner of the Thompson patent was executed prior to the acquisition of these patents by Cinema Corporation.

I do not know whether Cinema Patents Company knew of this agreement at the time they obtained title to the patents. The agreement was known after we obtained title, anyhow. I read the agreement some months ago. It forms a part of defendant's answer in this suit. When Spoor-Thompson Corporation assigned these patents to Cinema, it reserved a license to itself and it has two machines in operation under this license. The circumstances surrounding their license are slightly different from Consolidated's license in that the title to these two machines is vested in Spoor-Thompson so long as they used it for themselves; in other words, without the right to assign to anybody else. If they should, then the ownership of those machines becomes vested in Cinema Patents.

(Testimony of Morris J. Siegel)

The rate of royalty paid by the various licensees, with the exception of Eastman, is a uniform rate for positive film, and while I am not at liberty to divulge the actual royalty payments, that is, the percentage, the arrangements also provide for volume. The Eastman license gives to Eastman Kodak Company the right to develop film up to 25 millimeters.

Cinema Patents Company, Inc. is a subsidiary of Consolidated Film Industries, Inc. The stock of Cinema Patents Company, Inc. is held by Consolidated Film Industries.

"XQ71 Is it not true that there is a suit pending in the State Courts of California at the present time in which Cinema Patents Corporation is the plaintiff and William Horsley Laboratories is the defendant, based on the license to William Horsley Laboratories?

MR. HUEBNER: That question is just a little misleading. I will stipulate that a suit is pending based on a violation and breach of the license that you refer to.

MR. MAHONEY: I cannot stipulate that.

MR. HUEBNER: Then let the witness answer the question.

A. Yes, there is such a suit.

XQ72 And one of the prayers of that suit is for the recovery of unpaid license or royalty fees, is it not?

MR. HUEBNER: That is objected to as incompetent. The complaint on file shows that the prayers are in that suit pending in the State Court.

A I prefer to refer to my file before I answer the question. It is."

(Testimony of Morris J. Siegel)

Siegel Redirect

REDIRECT EXAMINATION

BY MR. HUEBNER:

"RDQ73 Is it not also true, Mr. Siegel, that another prayer of this amendment complaint in the State Court case asks the Court to declare the license agreement terminated and that the property, that is, the machines, in the hands of the defendant, be returned to the plaintiff?

A It is true.

BY MR. MAHONEY:

Q74 Which suit was filed first, the State Court suit or the present suit for patent infringement, do you know?

A The State Court suit was filed first.

Q75 And there has not been any decision in that State Court suit, has there?

A No decision."

It appears from the answers in Exhibit 3 that certain changes and additions were made on one of the developing machines in the Horsley Laboratories. The Cinema Patents Company did not know that those changes and additions had been made at the time that the Cinema Patents Company acquired the Thompson and the Gaumont patents.

M. J. SIEGEL.

Subscribed and sworn to before me this 29th day of November, 1930.

Arthur C. Smith

Notary Public Queens County, New York Certificate filed in New York County, No. 1432
Commission expires March 30th, 1932.

STATE OF NEW YORK)
) SS
COUNTY OF NEW YORK)

I, ARTHUR C. SMITH, a Notary Public in and for the County of Queens and State of New York, (certificate filed in New York County), duly commissioned, and qualified and authorized to administer oaths, and to take and certify depositions.

DO HEREBY CERTIFY that pursuant to notice served in the cause pending in the United States District Court, Southern District of California, Central Division, wherein Cinema Patents Company, Inc., a corporation, is Plaintiff, and Columbia Pictures Corporation, a corporation, and William Horsley Film Laboratories, Inc., a corporation, are defendants. I was attended at the office of H. A. Huebner, 1776 Broadway, New York, N. Y., by the witnesses Roscoe C. Hubbard and Morris J. Siegel and by Herbert A. Huebner, Counsel for Plaintiff, and Daniel V. Mahoney, Counsel for Defendants, as herein set forth.

That the said witnesses were of sound mind and lawful age and were by me first carefully examined and cautioned and sworn to testify to the truth, the whole truth and nothing but the truth; and they thereupon testified as herein shown; that the said depositions were given orally in the form of questions and answers and were taken down stenographically by me, a stenographer of the offices of Sidney C. Ormsby Company, law re-

porters, 217 Broadway, New York City, skilled in these matters and approved by counsel for the parties; and that the said depositions were thereafter reduced to typewriting, and that the witnesses read their respective deposition and signed their names thereto.

That the exhibits as herein set forth are hereto annexed.

That the taking of said depositions was begun on November 18th, 1930, at 10:00 A. M., in the forenoon and was concluded on November 22nd, 1930, in the forenoon.

I DO FURTHER CERTIFY that I am neither of counsel to either of the parties to said suit, nor in anywise interested in the event of said cause.

IN WITNESS WHEREOF I have hereunto set my hand and seal the 29th day of November 1930.

Arthur C. Smith

Notary Public Queens Co, N. Y. Cert filed in New York Co. #1432

The amendments to the statement are approved, and the statement with amendments is approved

April 16, 1932

Wm P. James
Dist Judge

[Endorsed]: Lodged Apr. 6, 1932. R. S. Zimmerman, Clerk, by Theodore Hocke, Deputy Clerk Filed Apr. 19, 1932. R. S. Zimmerman, Clerk, by Edmund L. Smith, Deputy Clerk

[TITLE OF COURT AND CAUSE.]

REPORT OF SPECIAL MASTER

TO THE HONORABLE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION:

The undersigned, DAVID B. HEAD, appointed Special Master by an order of this Court entered September 26, 1930, directing him to hear the evidence and report his conclusions and recommendations to the court, herewith submits his report.

By agreement of the parties the cause was set down for the taking of testimony, and on December 23, 1930 there appeared for the plaintiff Herbert A. Huebner, Esq., and for the defendants C. E. Millikan, Esq. and Frank L. A. Graham, Esq. The testimony was taken and the cause submitted upon the filing of briefs.

The action is in equity for infringement of Letters Patent Nos. 1,177,697 and 1,281,711. The title to the first patent, which was issued to Leon Gaumont, is now vested in the plaintiff. Its subject matter relates to the developing of photographic films, particularly films in elongated strips used in motion picture machines. Both a process and an apparatus are described. The apparatus is so constructed that a film placed in the machine for developing is passed over rollers and continuously and successively moved through tanks containing the various developing fixing and toning solutions used in the development of photographic film.

The second patent in suit was issued to F. B. Thompson, and the title to it is now vested in the plaintiff. It is

directed to a film treating apparatus operating on the same principle as the Gaumont machine but with the addition of certain refinements, designed to facilitate the movement of the film through the several baths. The film passes over rollers or spools grooved to guide the film.

There being no issues raised as to the validity and scope of the patents in suit it is not necessary to make a detailed examination of the patents. Certain facts concernind the development of motion picture film must be noted, whose relevancy will become apparent. First, that there are two types of film to be developed: the negative which is the film that comes from the camera, and the positive, which are printed from the negative in any number desired, resulting in reversal of lights and shadows of the negative. The positive films are used in the projection of the motion picture on the screen. The development of negative film requires a longer period of treatment in the bath of developing fluid than in the case of positive film, relatively two to four times. Second, that the greater volume of film developed is of two sizes, 35 millimeter film used in the commercial production of motion pictures and 16 millimeter film, used in the amateur production of motion pictures.

The facts which are not in dispute are as follows:

On June 26, 1925 an agreement—Defendants exhibit A, was entered into between the Chester Bennett Film laboratories, a Corporation, Frederick B. Thompson, Grace Seine Thompson of one party and William Horsley Laboratories, Inc. of the other party, whereby for a consideration the parties first mentioned agreed to install two motion picture film developing machines in the laboratory of the other party, and further granting a license

to use the invention of several patents including, among others, the patents in suit and any future patents for improvements on the subject matter of the patents. The contract provided for the payment of certain rentals and royalties.

Thereafter two film developing machines were installed in the William Horsley Film Laboratories. These machines were equipped with tanks suited only to the development of positive film and with spools or roller grooves to accommodate 35 millimeter film. After using one of the machines for some time, in 1926 the William Horsley Laboratories cut narrower guideways in the spools which carried the film, thereby adapting the machine to develop 16 millimeter film. The other contracting parties continued to receive payments of rentals and royalties after this date with knowledge of the change.

In June or July 1929 the William Horsley Laboratories, without the consent of the other contracting parties or their successors, added to the same machine an additional developing tank together with the other parts necessary to carry the film through the tank, thereby adding to the time the film could be treated in the developing fluid, and adapting the machine to the development of negative film. The plaintiff has succeeded to the rights under the contract of the Chester Bennett Laboratories, and the Thompsons, while the Columbia Pictures Corporation have succeeded to the rights of the William Horsley Film Laboratories.

From its brief it is evident that plaintiff no longer urges the change to accommodate 16 millimeter film as an infringement. Regardless, the acquiescence of plaintiff and its predecessors, in this use and their acceptance of pay-

ments of royalties on 16 millimeter film that was developed, place the plaintiff in a position where it cannot ask for equitable relief.

The plaintiff contends that the addition of the second developing tank and its use in the development of negative film infringes the patents in suit. The defendants admit that the use of the altered machine is covered by the patents in suit but that they are licensed by the agreement of June 26, 1925 to make such use of the machine. The patents under which the license was granted make no distinction between the development of positive and negative films, so it is at least clear that the defendants could use the machines in their original condition for this purpose.

The license relied upon in the paragraph numbered 1 grants a license "to use two machines for treating processing and developing photographic film" for the term of the patents previously recited and any other patents for improvements that might issue.

The paragraph numbered 5 is a lease of the machines to the user, with the right "to use maintain and operate". The other parts of the contract relate to royalties, option to purchase and installation. The question raised requires interpretation of the contract. The plaintiff contends that the license is subservient to the demise of the two machines, while the defendants contend that the license portion of the contract is unconditional in nature and grants the right to use any and all of the disclosures of the patents recited, together with the right to alter the installed machines to permit such use.

A contract must be interpreted by taking into consideration the contract as a whole, together with the matter

to which it relates—Section 1641 and 1647 Civil Code of California. A consideration of the contract as a whole discloses that its purpose is *th* provide for the leasing and use of two specific developing machines. The license while in general and broad terms is evidently intended to be in aid of and to protect the lessee in the use of the machines.

Therefore, it follows, that the license has no broader scope than to grant a right under the patents recited, to use, maintain and operate the machines which were the subject matter of the contract. The machines which were the subject matter of the contract are those referred to in the evidence and illustrated by the photograph Exhibit "A" attached to defendants answer to plaintiff's interrogatories.

The machines in question were designed, built and used for several years for developing positive film. These circumstances indicate that parties intended such a use to be made of machines at the time the contract was entered into.

That the licensee of a machine has a right to make repairs to remedy wear or breakage is clear from the authorities. He may maintain it in its original condition by repiars so long as the machine as a whole retains its identity.

Several authorities have been cited. The plaintiff relies upon George Close Co. vs Ideal Wrapping Machine Co. 29 Federal (2nd) 533. Herein the plaintiff had furnished the defendant with a machine for cutting candy into certain sizes. The defendants changed the machine by putting in a fewer number of cutting knives together with altering the operating means, thus permitting the

machine to cut caramels in larger sizes than before. Finding that this constituted a reconstruction of the machine, resulting in a different machine, producing a different result, the court found infringement. In Miller Hatcheries, Inc. vs. Buckeye Incubator Co. 41 Federal (2nd) 619 the defendant having previously purchased an incubator from the plaintiff, made changes in the incubator consisting of adding additional hatching trays and making changes in other features such as increasing the air supply, which resulted in substantially increasing the capacity of the machine. The court held that this constituted infringement. The defendant calls attention to a decision of the Supreme Court of the District of Columbia in Tabulating Machine Co. vs Durand 156 O. G. 258 (apparently not reported in the Federal Reporter). Herein the court held that changes made in a machine for sorting cards, which permitted the machine to sort a larger size of cards did not constitute infringement. If this case is in conflict with the decisions of the First and Eighth Circuit Courts of Appeal referred to above, the Circuit Court decisions being of higher authority must govern.

From the state of facts presented, a change which consists of adding an additional unit which permits the development of a different kind of film than the machine could theretofore develop, goes much further than change which increases the capacity of a machine (Miller Hatcheries Case supra) or vary the size of the product (Candy cutting machine case supra). The machine produces a

different result than that for which it was leased, and therefore licensed.

The contention that inasmuch as no change was made in the parts of the original machine there could be no reconstruction is not valid. It does not matter whether it constitutes reconstruction or something else. It is pertinent only to find whether or not the changes made come within the grant "to use, maintain and operate" as heretofore interpreted. The master concludes that it does not and it follows that the patents in suit are infringed.

It is concluded:

1. That title to Letters Patent Nos. 1,177,697 and 1,281,711 is vested in the plaintiff.

2. That said Letters Patents are good and valid in law.

3. That said Letters Patent are infringed by the defendants use of the altered developing machine heretofore described.

It is recommended that a decree be entered in conformity with this report, finding the Letters Patent in suit infringed and directing that an accounting of profits and damages be had.

The foregoing portion of this report was submitted to counsel in the form of a draft. The defendants filed certion exceptions. The first three exceptions go to the expressions that the original machines were suited only to the development of positive film, that such was the intention of the parties, and that the development of negative film in the reconstructed machine produced a different result. The master is satisfied that these statements in

the report are correct. However, it is not the intention of the master to recommend a decree that will restrain the defendants from using the machines in their unaltered condition for the development of any particular type of film.

The fourth exception goes to the law of reconstruction. It was the masters intention to refer to the cases cited on this point as a guide to the interpretation of the grant "to use, maintain, and operate", rather than to reach a definition of the word "reconstruct". On the defense of the license the contract must govern, and the construction placed upon its language, together with a consideration of the subject matter of the contract as well as the construction placed upon the contract by the parties are all elements to be considered. The expression that "it does not matter whether it constitutes reconstruction or something else" (page 8, line 21 supra) should be read in conjunction with the following sentence, which makes it clear that it does not matter as long as the use complained of does not come within the license grant of the contract.

The defendants' exceptions do not appear to be well taken and the report is being filed as drafted.

Returned herewith are the original files in the case together with a transcript of the testimony taken, the exhibits filed, and the briefs and other papers filed in the proceedings before the Special Master.

Respectfully submitted,

David B Head.

David B. Head

Special Master

[Endorsed]: Filed Jun 26 1931 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk

[Title of Court and Cause.]

DEFENDANTS' EXCEPTIONS TO MASTER'S FINAL REPORT

Now come Defendants and file their exceptions to the Special Master's Final Report in the above entitled case:

EXCEPTION No. 1

The Special Master erred in finding that "These machines were equipped with tanks *suited only* to the development of positive film", (Italics ours) (Master's Report pg. 4, lines 1 to 3,) and in finding that "The machines in question were designed, built and used for several years for developing positive film. These circumstances indicate that parties *intended* such use to be made of machines at the time the contract was entered into." (Italics ours.) Master's Report pg. 6, line 23, et seq.

EXCEPTION No. 2

The Special Master erred in finding that—"From the facts presented, a change which consists in adding an additional unit which permits the development of *a different kind of film than the machine could theretofore develop,* goes much further than a change which increases the capacity of a machine (Miller Hatcheries case supra) or vary the size of the produce (Candy Cutting Machine case supra). The machine produces a different result than that for which it was leased and therefore licensed." Master's Report, pg. 8, (Italics ours).

EXCEPTION No. 3

The Special Master erred in holding that "The contention that inasmuch as no change was made in the parts of the original machine there could be no reconstruction is not valid".

EXCEPTION No. 4

The Master erred in finding "That said Letters Patent are infringed by defendant's use of the altered developing machine heretofore described."

EXCEPTION No. 5

The Master erred in finding that "A consideration of the contract as a whole discloses that its purpose is to provide for the leasing and use of two specific developing machines." (Master's Report, pg. 6, lines 9 to 11.)

EXCEPTION No. 6.

The Special Master erred in not finding that the present licensor in filing suit in the Superior Court for Cancellation of the license and collection of royalties, which suit was pending at the time the present suit for infringement was filed, had made an election which precluded the Licensor from maintaining the present suit for infringement.

Los Angeles, California, July 15, 1931.

Respectfully submitted,

Loyd Wright
Charles E. Millikan
Frank L. A. Graham
Attorneys for Defendants.

[Endorsed]: Received copy of within Exceptions this 15th day of July, 1931. Herbert A. Huebner, Robert M. McManigal, attorneys for plaintiff. Filed Jul· 15, 1931 R. S. Zimmerman, Clerk by Edmund L Smith, Deputy Clerk.

[Title of Court and Cause.]

RULING ON EXCEPTIONS TO MASTER'S REPORT.

This action was brought by plaintiff to have an injunction and to recover damages and profits for the alleged infringement of letters patent No. 1,177,697 and No. 1,281,711. The case was referred to a special master, who made his report, finding infringement and recommending a decree accordingly. Exceptions were taken by the defendants to the report, and have been presented by oral argument of counsel.

The predecessors in interest of the plaintiff, then the owners of patent rights under the second numbered patent and other patents issued and applied for, in June, 1925, entered into a contract with the defendant William Horsley Film Laboratories, Inc. The patents had to do with the developing and processing of photographic film used in the production of motion pictures. The contract referred to recited, first, the fact of the issuance of the patents by number and the fact of pending applications, and that the defendant last named was desirous of acquiring a license to operate two machines "for treating, processing and developing photographic films, which machines and apparatus connected therewith are the invention of the said Frederick B. Thompson, and the subject of the aforesaid patents and patent applications", and that the defendant named "was desirous of having the parties of the first, second and third part construct and install the two machines for treating, processing and developing photographic films at the place of business of the party of the fourth part in the film laboratory of

the party of the fourth part. * * * Therefore said parties * * * have and do hereby agree together as follows: '1. Parties of the first, second and third part do hereby grant to the party of the fourth part the right, liberty and license to use two machines for treating, processing and developing photographic films for the full term of any and all of the aforesaid patents granted to the party of the second part, and all other patents that may be granted to the party of the second part on the aforesaid patent applications, or for any improvements thereon, for the consideration, period of time and under the conditions hereinafter expressed." The conditions following provided for the installation of two machines by the first contracting parties and that the defendant named should, on the completion of the installation, pay ten per cent. of the cost of the construction and such installation, which was to be credited against the license charge which was fixed at one-fourth of one mill per foot for all films developed and processed.

The licensee proceeded to use the machines that were installed in the development of positive film for several years. The development of negative film required that the film be treated longer in the various solutions used, although the testimony was that both machines might be used for the development of either kind of film. In order to better handle negative film, the licensee installed on one machine an additional tank to hold developing fluid and necessary rollers and gears to carry the film through such additional tank. It is because of this act that infringement is charged. The licensee did not reconstruct any of the principal parts of the machine nor alter its method of operation.

The contention of the defendants is that under their license contract, they were to have the benefit of the invention described in the patents and that the addition of the developer tank and appurtenances, merely operating to make the tank perform more effectually the functions designed in the patents, is within their right as licensees.

The master found to the contrary, although he expressly found that the license granted was "to use the invention of the several patents including, among others, the patents in suit and any future patents for improvements on the subject matter of the patents." He found that the machine "produces a different result than that for which it was leased and therefore licensed." The first finding referred to hardly sustains the conclusion of the master last stated. My conclusion is, after an examination of the record, that the license agreement authorized the use of two machines in the processing of films in any way so long as that use was within the description of the invention as disclosed by the patents which were referred to in the agreement. It follows that the acts of the defendants did not constitute infringement.

The further matter urged in defense, to-wit: that prior to the bringing of this suit the plaintiff had commenced an action in the state court to terminate the lease contract and recover royalties, asserting the change made in the developing machine as cause therefor, thereby electing to waive the right to bring an action for infringement, need not be discussed in view of the conclusion already arrived at.

The exceptions of defendants to the master's report, insofar as they propose objections which have been disposed of in the foregoing discussion, are sustained.

Decree is ordered to be entered in favor of the defendants. An exception will be noted upon plaintiff's behalf.

Dated September 17, 1931.

Wm P James
U. S. District Judge

[Endorsed]: Filed Sep 17 1931 R. S. Zimmerman, Clerk By Murray E Wire Deputy Clerk

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[Title of Court and Cause.]

ORDER ADOPTING COURT'S RULING ON EXCEPTIONS TO MASTER'S REPORT AS FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The above entitled cause coming on to be heard upon the exceptions of the Defendants, Columbia Pictures Corporation and William Horsley Film Laboratories, Inc., to the Master's Report herein, after hearing the arguments of counsel of the respective parties the Court filed an Opinion under date of September 17, 1931, entitled "Ruling on Exceptions to Master's Report".

It is hereby ordered that the said Opinion entitled "Ruling on Exceptions to Master's Report" filed herein be and the same is hereby adopted in lieu of and with the same force and effect as Findings of Fact and Conclusions of Law.

Dated this 11 day of January, 1932.

Wm P James
Judge.

APPROVED AS TO FORM AS PROVIDED IN RULE 45.

Herbert A Huebner
Attorney for Plaintiff
by W. D. Foster.

[Endorsed]: Filed Jan 11 1932 R. S. Zimmerman, Clerk By Murray E Wire Deputy Clerk

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[Title of Court and Cause.]

FINAL DECREE

THIS CAUSE having come on to be heard upon the pleadings and proof filed and produced on behalf of both parties and having been submitted on brief by counsel for both parties,

NOW THEREFORE, upon consideration thereof it is hereby ordered and adjudged and decreed as follows:

(1) That the Bill of Complaint herein be and the same is hereby dismissed.

(2) That defendants have and recover judgment against plaintiff for the sum of $230.20, defendants' costs and disbursements herein, said costs to be taxed by the Clerk of this Court.

Wm P James
District Judge.

APPROVED AS TO FORM AS PROVIDED IN RULE 45.

Herbert A Huebner
Attorney for Plaintiff.

Decree entered and recorded JAN 11 1932
R. S. Zimmerman Clerk.
By Murray E Wire Deputy Clerk,

[Endorsed]: Filed Jan 11 1932 R. S. Zimmerman, Clerk By Murray E Wire Deputy Clerk

[Title of Court and Cause.]

PETITION FOR APPEAL

The Plaintiff, Cinema Patents Company, Inc., conceiving itself aggrieved by the final decree entered herein on the eleventh day of January, 1932, does hereby appeal from the said decree to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the Assignment of Errors which is filed herewith; and it prays that this appeal may be allowed and a citation granted directed to the above named Defendants, Columbia Pictures Corporation and Wm. Horsley Film Laboratories, Inc., commanding them and each of them to appear before the United States Circuit Court of Appeals for the Ninth Circuit to do and receive what may appertain to justice in the premises; and that a transcript of the record, proceedings, exhibits, and papers upon which said decree was made, together with a copy of the opinion filed herein, be duly authenticated and sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Your petitioners further pray that the proper order relating to the required security to be furnished by it be made.

CINEMA PATENTS COMPANY, INC.
By Herbert A Huebner
Ward D. Foster
Attorneys for Plaintiff

Dated at Los Angeles March 25, 1932

ORDER ALLOWING APPEAL

The foregoing Petition is hereby allowed, Plaintiff to file a cost bond in the sum of Two Hundred & Fifty Dollars.

Wm P James
United States District Judge

Dated, March 29, 1932

[Endorsed]: Filed Mar 29 1932 R. S. Zimmerman, Clerk By Theodore Hocke Deputy Clerk

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[Title of Court and Cause.]

ASSIGNMENT OF ERRORS

Now comes the Cinema Patents Company, Inc., Plaintiff in the above entitled cause, by its attorneys, and presents, with the accompanying Petition for Appeal from the final decree entered herein, the following Assignment of Errors upon which it will rely in the prosecution of its appeal from the decree entered herein by the United States District Court for the Southern District of California on the 11th day of January, 1932:

I. That the court erred in refusing to adopt the recommendations and sustain the conclusions of the Special Master.

II. That the court erred in finding that the license agreement authorized the use of two machines in the

processing of film in any way so long as that use was within the description of the invention as disclosed by the patents which were referred to in the agreement.

III. That the court erred in finding United States Letters Patent No. 1,177,697 to Leon Gaumont, not infringed.

IV. That the court erred in finding United States Letters Patent No. 1,281,711 to Frederick B. Thompson, not infringed.

V. That the court erred in ordering, adjudging and decreeing "That the Bill of Complaint herein be and the same is hereby dismissed."

VI. That the court erred in ordering, adjudging and decreeing "That the Defendants have and recover judgment against Plaintiff for the sum of $320.20, Defendants' costs and disbursements herein . . . ."

VII. That the court erred in not granting the relief prayed for in the Bill of Complaint for infringement of said United States Letters Patents No. 1,177,697 and No. 1,281,711.

CINEMA PATENTS COMPANY, INC.
By Herbert A Huebner
Ward D. Foster
Attorneys for Plaintiff

Dated at Los Angeles March 25, 1932

[Endorsed]: Filed Mar 29 1932 R. S. Zimmerman, Clerk By Theodore Hocke Deputy Clerk

[TITLE OF COURT AND CAUSE.]

NOTICE OF LODGMENT OF CONDENSED STATEMENT OF THE EVIDENCE

To Messrs. Frank L. A. Graham, Esq.
C. E. Milliken, Esq.
Lloyd Wright, Esq.
Subway Terminal Building
Los Angeles, California

PLEASE TAKE NOTICE that we have this day lodged with the Clerk of the above court a condensed statement of the evidence herein in accordance with Equity Rule 75 and that we shall ask Honorable William P. James, a judge of this court, to approve such statement of evidence at his chambers in the Post Office and Federal Building, Los Angeles, California, at 1:30 o'clock in the afternoon on April 18th, 1932, or at such other time and place as said judge may decree.

Herbert A Huebner

.....

Attorneys for Plaintiff

Dated, April 6th, 1932

Copy received this 6th day of April, 1932.

.....

Frank L A Graham

.....

Attorneys for Defendants

[Endorsed]: Filed Apr 6 1932 R. S. Zimmerman, Clerk By Theodore Hocke Deputy Clerk

[Title of Court and Cause.]

STIPULATION

IT IS HEREBY STIPULATED by the parties to the above entitled cause, through their respective attorneys, that the transcript on appeal heretofore taken by plaintiff need not repeat the title of the cause in any paper included in the transcript other than the Bill of Complaint, and that there may be likewise omitted from the transcript all endorsements on the backs or covers of such papers, except those relative to service of copy, or identification as evidence, provided that the endorsement as to filing in each instance appear and be printed. This stipulation is entered into to save expense and encumbrance of the record.

Dated at Los Angeles, California, April 21st, 1932.

Herbert A. Huebner
Ward D. Foster
Attorneys for Appellant

Loyd Wright
Charles E Millikan
Frank L A Graham
Attorneys for Appellees.

[Endorsed]: Filed Apr 21 1932 R. S. Zimmerman, Clerk By Theodore Hocke Deputy Clerk

[Title of Court and Cause.]

STIPULATION

IT IS HEREBY STIPULATED, subject to the approval of the Court, that there shall be prepared five (5) copies of an indexed book of exhibits, one of which shall be served with copy of the record in this case upon defendants, and another to be retained by plaintiff, and three (3) to be filed with the United States Circuit Court of Appeals to accompany the record on appeal, which book of exhibits shall contain copies of the following documents introduced during the trial of said cause:

Plaintiff's Exhibit 1, Gaumont Patent No. 1,177,697
Plaintiff's Exhibit 2, Thompson Patent No. 1,281,711
Defendants' Exhibit C, Thompson Patent No. 1,328,464
Defendants' Exhibit D, Thompson Patent No. 1,260,595
Defendants' Exhibit E, Thompson Patent No. 1,299,266
Defendants' Exhibit F. Thompson Patent No. 1,569,156
Defendants' Exhibit G, Thompson Patent No. 1,587,051.

IT IS FURTHER STIPULATED that the Clerk of the District Court shall be requested to forward to the Clerk of the United States Circuit Court of Appeals the above Exhibits.

Dated at Los Angeles, California, this 21st day of April, 1932.

Herbert A. Huebner
Ward D. Foster
Attorneys for Plaintiff-Appellant

Loyd Wright
Charles E Millikan
Frank L A Graham
Attorneys for Defendants-Appellees

IT IS SO ORDERED, this 25 day of April, 1932.

Wm P James
District Judge.

[Endorsed]: Filed Apr 27 1932 R. S. Zimmerman, Clerk By Edmund L Smith Deputy Clerk

SEYLER-DAY CO. Gen. Agts
1120 Corporation Bldg.
724 So. Spring St.
LOS ANGELES
California.

[TITLE OF COURT AND CAUSE.]

UNDERTAKING ON APPEAL

WHEREAS, the Plaintiff in the above entitled action is about to appeal to the Circuit Court of Appeals for the Ninth District at San Francisco, California, from a decree entered against it dismissing the bill of complaint in said action in said United States District Court Southern District of California, Central Division, in favor of the Defendants in said action on the 11th day of February, 1932,

NOW THEREFORE, in consideration of the premises and of such appeal, the undersigned NATIONAL SURETY COMPANY, a corporation organized and existing under the laws of the State of New York, and duly authorized to transact a general surety business in the State of California, does hereby undertake and promise on the part of the Appellant that said Appellant will pay all damages and costs which may be awarded against it on the appeal, or on a dismissal thereof, not exceeding TWO HUNDRED FIFTY ($250.00) DOLLARS, to which amount it acknowledges itself bound.

IN WITNESS WHEREOF, the said Surety has caused these presents to be executed and its official seal attached by its duly authorized Attorney in Fact at Los Angeles, California, the 5th day of April, A. D. 1932.

NATIONAL SURETY COMPANY
Arden L. Day (seal)
ATTORNEY IN FACT.

The premium charged for this bond is $10.00 per annum

I hereby approve the foregoing bond.

Dated the 6th day of April, 1932

Wm. P. James
Judge.

STATE OF CALIFORNIA)
) SS
COUNTY of Los Angeles)

On this 5th day of April, in the year 1932, before me, Frances T. Mixson, A Notary Public in and for the said County and State, residing therein, duly commissioned and sworn personally appeared Arden L. Day, known to me to be the person whose name is subscribed to the within instrument at the Attorney-in-fact of the NATIONAL SURETY COMPANY, a Corporation, and acknowledged to me that he subscribed the name of the NATIONAL SURETY COMPANY thereto as Principal and his own name as Attorney-in-fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

Frances T. Mixson
Notary Public in and for said County and State.
[Seal] My Commission expires August 31, 1932

[Title of Court and Cause.]

PRAECIPE

To the Clerk,
United States District Court,
Southern District of California.

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal allowed in the above entitled cause, and to include in such transcript of record the following, and no other papers and exhibits, to-wit:

1. Bill of Complaint.

2. Answer of Defendant Columbia Pictures Corporation, including "Exhibit A" attached thereto.

3. Answer of Defendant Wm. Horsley Film Laboratories, Inc., omitting "Exhibit A" and "Exhibit B" attached thereto.

4. Plaintiff's Interrogatories and Order Re Interrogatories.

5. Answer of Defendant Columbia Pictures Corporation to Interrogatories Propounded By Complainant, including annexed photograph "A".

6. Answers of Defendant Wm. Horsley Film Laboratories to Interrogatories Propounded By Complainant, omitting the annexed photograph "A".

7. Motion For Order Referring Cause to Master, Notice of Hearing same, and Affidavit of M. J. Siegel in support of same.

8. Order Referring Cause to Master.

9. Notice of Taking Depositions and Order re same.

10. Stipulation Continuing Time For Taking Depositions.

11. Condensed Statement of Evidence, including Depositions of Roscoe C. Hubbard and M. J. Siegel reduced to narrative form, omitting from the deposition Exhibits No. 1, No. 2 and No. 3.

12. Order Approving Condensed Statement of Evidence.

13. Report of Special Master, being the Draft Report of Special Master as amended by substitution of new page 9 and additional page 10.

14. Ruling by Honorable Wm. P. James, District Judge, on Exceptions to Master's Report.

15. Order Adopting Court's Ruling on Exceptions to Master's Report as Findings of Fact and Conclusions of Law.

16. Final Decree.

17. Petition for Appeal with Order Allowing Appeal.

18. Assignment of Errors.

19. Original Citation on Appeal.

20. Notice of Lodgment of Statement of Evidence.

21. This Praecipe and Service Thereon.

22. Clerk's Certificate.

Plaintiff's Exhibits

No. 1. Certified Copy of United States Letters Patent No. 1,177,697 to Leon Gaumont.

No. 2. Certified Copy of United States Letters Patent No. 1,281,711 to Frederick B. Thompson.

Defendants' Exhibits

United States Letters Patent:

C. No. 1,328,464 to Frederick B. Thompson

D. No. 1,260,595 to Frederick B. Thompson

E. No. 1,299,266 to Frederick B. Thompson

F. No. 1,569,156 to Frederick B. Thompson

Said transcript to be prepared as required by law and the Rules of this Court, the Rules of the United States Circuit Court of Appeals for the Ninth Circuit, and the Federal Equity Rules, and to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit on or before the 27th day of April, 1932.

Dated at Los Angeles, April 6th, 1932

Herbert A Huebner
Ward D. Foster
Attorneys for Appellant

Service of the above Praecipe accepted and acknowledged this 6th day of April, 1932.

Frank L. A. Graham

.....

Attorneys for Appellee

[Endorsed]: Filed Apr 6 1932 R. S. Zimmerman, Clerk By Theodore Hocke Deputy Clerk

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[Title of Court and Cause.]

APPELLEE'S PRAECIPE.

To the Clerk,
United States District Court,
Southern District of California.

You are hereby requested to include in the transcript of record to be filed in the United States Circuit Court of Appeals, for the Ninth Circuit, pursuant to an appeal allowed in the above entitled cause, the following papers and exhibits:

1. Defendants' Exceptions to Master's Final Report, (this refers only to the numbered Exceptions, and does

not include the written argument offered in connection with such Exceptions, Exceptions to be printed being the same as attached hereto and marked "Praecipe Exhibit A").

2. Appellee's Praecipe and service.

Defendants' Exhibits.

Defendants' Exhibit B, (certified copy of first amended Complaint in suit of Superior Court of the State of California, in and for the County of Los Angeles, entitled "Cinema Patents Company, Inc., a corporation, plaintiff, vs. William Horsley Film Laboratories, Inc., a corporation, defendants).

Defendants' Exhibit G, (patent to Frederick B. Thompson, numbered 1,587,051).

Dated at Los Angeles, California, this 13th day of April, 1932.

Loyd Wright
Charles E. Millikan
Frank L. A. Graham
Attorneys for Appellee.

Service of the above Praecipe accepted and acknowledged this 13th day of April, 1932.

Herbert A. Huebner
Ward D. Foster
Attorneys for Appellant.

Stipulated that the above may be incorporated in the record

Ward D. Foster
Herbert A. Huebner
Attorneys for Appellant
Frank L. A. Graham
Atty. for Appellee.

[Endorsed]: Filed Apr. 16, 1932 R. S. Zimmerman Clerk by Theodore Hocke Deputy Clerk.

[Title of Court and Cause.]

CLERK'S CERTIFICATE

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 147 pages, numbered from 1 to 147 inclusive, together with the book of exhibits under separate cover containing 95 pages of patents pursuant to stipulation dated Apr. 27, 1932 (printed in the foregoing record) to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; bill of complaint; answer of defendant Columbia Pictures Corporation, including exhibits attached thereto; answer of defendant Wm. Horsley Film Laboratories, Inc., omitting "Exhibit A" and "Exhibit B" attached thereto; plaintiff's interrogatories and order re interrogatories; answer of defendant Columbia Pictures Corporation to interrogatories; answer of defendant Wm. Horsley Film Laboratories to interrogatories; notice of hearing of motion and motion for order referring cause to master and affidavit of M. J. Siegel in support of motion; order referring cause to master; stipulations continuing time for taking depositions; notice of taking depositions and order re same; condensed statement of evidence and order approving same; report of special master; ruling and exceptions to master's report; order adopting court's ruling on exceptions as findings of fact and conclusions of law; final decree; petition for appeal and order allowing appeal; assignment of errors; notice of lodg-

ment of statement of evidence; stipulation re printing of record; stipulation re exhibits; undertaking on appeal; praecipe and appellee's praecipe.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is $ and that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to..... and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this..... day of May in the year of Our Lord One Thousand Nine Hundred and Thirty-two, and of our Independence the One Hundred and Fifty-sixth.

R. S. ZIMMERMAN,
Clerk of the District Court of the United States of America, in and for the Southern District of California.

By

Deputy.

No. 6852.

IN THE

United States Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

CINEMA PATENTS COMPANY, INC., a corporation,

Appellant,

—against—

COLUMBIA PICTURES CORPORATION, a corporation, and WILLIAM HORSLEY FILM LABORATORIES, INC., a corporation,

Appellees.

BRIEF FOR APPELLANT.

HERBERT A. HUEBNER,
WARD D. FOSTER,
Attorneys for Appellant.

THE COURT PRESS, INC., Law Printers, 130 Cedar St., N. Y. C.

SUBJECT INDEX.

TABLE OF CASES CITED:

AUTHORITIES CITED:

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No. 6852.

CINEMA PATENTS COMPANY, INC., a corporation,

Appellant,

—against—

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Appellees.

BRIEF FOR APPELLANT.

Statement of the Case.

This is a patent suit involving the scope of a lease and license agreement.

THE PLEADINGS.

Plaintiff* filed a bill (Tr. 3) in the District Court charging defendants with infringement of two patents: Leon Gaumont No. 1,177,697 (Exhibit 1) granted April 4, 1916; and Frederick B. Thompson No. 1,281,711 (Exhibit 2) granted October 15, 1918—both covering apparatus for processing motion picture film. The Gaumont patent also contains a method claim. The bill, in the usual form, does not anticipate any defenses.

* For convenience, the appellant will in this brief be referred to as the plaintiff, and the appellees as the defendants.

The defendants filed separate answers (Tr. 12, 48) which were the same in substance.

Various defenses were mentioned, but only two of them urged at the trial: (1) A lease and license agreement under which the defendants sought to justify their acts complained of; (2) the pendency of an action in the Superior Court of the County of Los Angeles, State of California, asserted by the defendants to bar the present suit.

The lease and license agreement is set forth in full (Tr. 23-34) as Exhibit A; and the "First Amended Complaint" in the Superior Court action is produced (Tr. 34-47) as Exhibit B.

PROCEEDINGS PRIOR TO TRIAL.

The plaintiff moved for an order of reference to a Special Master for trial (Tr. 73 *et seq.*), which motion the defendants resisted; but the motion was granted and the Order made by District Judge Jacobs (Tr. 80), the objection of counsel for the defendants being noted and an exception allowed.

The defendants, however, made no further point of the reference.

By leave of the Court the plaintiff took depositions of two witnesses, R. C. Hubbard and M. J. Siegel in New York City prior to the trial (Tr. 103-120).

TRIAL AND JUDGMENT.

The case was tried before David B. Head, Esq., appointed Special Master by the Order of reference, who subsequently filed his Report (Tr. 121-128) in which he concluded that:

> 1. Title to the patents in suit is vested in the plaintiff.
>
> 2. The patents are good and valid in law.

3. The patents are infringed by the defendants' use of the altered developing machine (described in the Report).

The Report recommended that a decree be entered in conformity with the Report, finding the Letters Patent in suit infringed, and directing that an accounting of profits and damages be had.*

Defendants filed Exceptions to the Master's Report (Tr. 129), which were argued before District Judge William P. James.

Judge James, in a Ruling on Exceptions to Master's Report (Tr. 131-134) refused to sustain the conclusions or to adopt the recommendations of the Master on the question of infringement; and a Final Decree (Tr. 135) was entered dismissing the Bill with costs.

From this Decree the plaintiff appeals.

FACTS NOT IN DISPUTE.

The Leasing Agreement. On June 26, 1925 the agreement, Defendants' Exhibit A, was entered into between the Chester Bennett Film Laboratories, a corporation, Frederick B. Thompson, Grace Seine Thompson of one

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Master's Report, finding facts and recommending decree in favor of plaintiff, is entitled to great weight and should not be disregarded unless clearly wrong. This was true even before the Supreme Court adopted new Equity Rule No. 61½; the Circuit Court of Appeals for the Eighth Circuit, in *Parker et al.* v. *Interstate Trust and Banking Company et al.*, 56 F. 2d 792, saying at page 793:

> "* * * the master, though the order was consented to was really the court's master by appointment, and not the parties' master by consent. *Denver* v. *Denver Union Water Co.*, 246 U. S. 178, 38 S. Ct. 278, 62 L. Ed. 649. Even so, the findings of a master are entitled to great weight, and should not be disregarded unless clearly wrong (*Paepcke* v. *Kirkman* [C. C. A.], 55 F. 2d 814), especially where testimony is taken orally before the master, and the judge acts only on the record. *In re Slocum* (C. C. A.), 22 F. 2d 282, 285; *In re Perel* (D. C.), 51 F. 2d 506; *Baltic Cotton Co.* v. *U. S. A.* (C. C. A.), 55 F. 2d 568."

This opinion was written just prior to the adoption of Equity Rule 61½. Whether or not the rule may be considered retroactive, it clearly indicates that the attitude of the Supreme Court corresponds to the foregoing expression by the Circuit Court of Appeals for the Fifth Circuit.

party, and William Horsley Laboratories, Inc. of the other party, whereby for a consideration the parties first mentioned agreed to manufacture and install two motion picture film developing machines in the laboratory of the other party, and granting a license under several patents including Plaintiff's Exhibit 2, and Defendants' Exhibits C-G inclusive. The Gaumont patent, Plaintiff's Exhibit 1, was not owned by the licensor.

By the contract the two machines were to be leased by the first named parties to the other party, for a specified monthly payment of rentals and royalties computed on the number of feet of film processed.

Machines Installed. Thereafter two film developing machines were manufactured and installed as agreed, in the William Horsley Film Laboratories.

These machines were what are known in the industry as "positive" machines; that is they were suitable only for developing *positive* motion picture film, as distinguished from *negative.*

Defendants Alter One Machine. In June or July, 1929, the William Horsley Laboratories, without the consent of the other contracting parties or their successors, added to one of the machines an additional developing tank and other parts including a frame, spools, shafts and driving mechanism necessary to carry the film through the tank, thereby adding to the time the film could be treated in the developing fluid, and *adapting the machine to the development of negative film.**

Present Status of the Parties. The plaintiff has succeeded to the rights under the contract of the Chester Bennett Laboratories and the Thompsons, including ownership of the Thompson patents and of the leased developing machines.

The defendant, Columbia Pictures Corporation, owns,

* Emphasis in this brief is ours, whether by italics or bold face type.

controls and operates the William Horsley Film Laboratories.

Machine Described. The patented machine—and therefore the machine leased to the defendants—is an automatic device for processing long strips of motion picture film.

The principal elements are the tanks, arranged in a row, and containing suitable chemicals; several series of spools mounted on shafts over which the film is supported, and travels; and a combination of gears, shafts and a source of power for rotating some of the spools to advance the film through the various tanks. Succeeding the last tank in the series is a drying cabinet in which the film is thoroughly dried while passing through.

Types of Film Processed. In the art there are three types of film to be developed: the picture *negative* which is the film that comes from the camera; the *sound track* negative upon which is recorded the sound as translated by a light valve in the recording device; and the *positive*, which is photographically printed from the two negatives in any number desired, resulting in reversal of lights and shadows of the negatives. The positive films, termed in the parlance of the trade "release prints" are used in the projection of the motion picture on the screen.

The development of negative* film requires a longer period of treatment in the bath of developing fluid than in the case of positive film, relatively two to four times. To accomplish this, the negative film must be advanced more slowly than the positive, or must be treated in a machine having greater developing capacity: that is, larger tanks, or more of them, with corresponding film supporting and advancing mechanism.

Other facts are referred to in the ARGUMENT.

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* The term "negative" as used hereinafter in this brief means picture negative unless otherwise specified.

THE ISSUES.

Plaintiff contends that adding the second developing unit and using it for developing negative film is an infringement of the patents in suit.

The Thompson patent No. 1,281,711—Exhibit 2—dominates the group mentioned in the lease and license agreement, having combination claims directed to the machine as a complete structure. The other patent, Gaumont No. 1,177,697 was acquired by a successor of the Chester Bennett Laboratories and the Thompsons and subsequently came into the hands of the plaintiff. The Gaumont patent is earlier than, and dominates, the Thompson patent.

Plaintiff concedes that, so long as the defendants acted within the lease and license agreement, they enjoyed by operation of law the protection of the Gaumont patent as well as the Thompson patents mentioned in the agreement; but, plaintiff contends that the defendants went beyond the scope of the license by altering one of the machines and thereafter using it, and thus became subject to action for infringement of both the Thompson and the Gaumont patents.

The defendants admit that the altered machine and the use thereof is covered by the patents in suit, but assert that they acted within the said agreement of June 26, 1925.

The pivotal question involving the merits is:

> **Did the defendants, in altering the developing machine and thereafter using it to develop negative film, act within the license granted them in the agreement of June 26, 1925?**

If they acted within the license in so doing, they did not infringe. If the license did not protect them in their acts, they did infringe.

Another question argued by the defendants before the trial court, but not decided by that court and therefore not properly raised in this appeal (*Willard et al.* v. *Union Tool Co.,* 8 F. (2d) (C. C. A. 9) 264) is:

Did the filing of the Superior Court case bar the present action?

Specification of Errors Relied Upon.

All of the errors assigned (Tr. 137) are relied upon; they are here repeated and explained, pursuant to Rule 24 of this court.

I. *That the court erred in refusing to adopt the recommendations and sustain the conclusions of the Special Master.*

The Special Master concluded (Tr. 127): "1. That title to Letters Patent Nos. 1,177,697 and 1,281,711 is vested in the plaintiff." No exception was taken by either party to this conclusion; and the Court's Ruling on Exceptions to Master's Report is silent with respect to title.

The Master next concluded: "2. That said Letters Patent are good and valid in law." No exception was taken by either party to this conclusion; and the Court's Ruling is silent with respect to validity.

The Master further concluded: "3. That said Letters Patent are infringed by the defendants' use of the altered developing machine heretofore described." Defendants excepted to this conclusion in Exception No. 4 (Tr. 130), asserting: "The Master erred in finding 'That said Letters Patent are infringed by defendants' use of the altered developing machine heretofore described'."

The Court held as follows (Tr. 133): "My conclusion is, after an examination of the record, that the license agreement authorized the use of two machines in the

processing of films in any way so long as that use was within the description of the invention as disclosed by the patents which were referred to in the agreement. It follows that the acts of the defendants did not constitute infringement."

The Special Master recommended (Tr. 127): "that a decree be entered in conformity with this report, finding the Letters Patent in suit infringed and directing that an accounting of profits and damages be had." No exception was entered to this recommendation.

The Court ruled, however (Tr. 134) that a decree "be entered in favor of the defendants".

The Master's Report was silent on the defense of election of remedies.

However, the defendants excepted to this silence in Exception No. 6, asserting (Tr. 130): "The Special Master erred in not finding that the present licensor in filing suit in the Superior Court for cancellation of the license and collection of royalties, which suit was pending at the time the present suit for infringement was filed, had made an election which precluded the Licensor from maintaining the present suit for infringement."

The Court (Tr. 133) declined to consider this point in view of its decision that the bill be dismissed because of no infringement.

II. *That the Court erred in finding that the license agreement authorized the use of two machines in the processing of film in any way so long as that use was within the description of the invention as disclosed by the patents which were referred to in the agreement.*

As found by the Special Master (Tr. 125), a "consideration of the contract as a whole discloses that its purpose is to provide for the leasing and use of two specific developing machines. The license, while in general and broad

terms, is evidently intended to be in aid of and to protect the lessee in the use of the machines.

"Therefore, it follows, that the license has no broader scope than to grant a right under the patents recited, to use, maintain and operate the machines which were the subject of the contract."

The defendants excepted to this finding in Exception No. 5, asserting (Tr. 130): "The Master erred in finding that 'A consideration of the contract as a whole discloses that its purpose is to provide for the leasing and use of two specific developing machines.' (Master's Report, p. 6, ll. 9 to 11.)"

The Court impliedly sustained this Exception (Tr. 133), in ruling: "The exceptions of defendants to the master's report, insofar as they propose objections which have been disposed of in the foregoing discussion, are sustained."

III. That the Court erred in finding United States Letters Patent No. 1,177,697 to Leon Gaumont, not infringed.

IV. That the Court erred in finding United States Letters Patent No. 1,281,711 to Frederick B. Thompson, not infringed.

V. That the Court erred in ordering, adjudging and decreeing "That the Bill of Complaint herein be and the same is hereby dismissed."

VI. That the Court erred in ordering, adjudging and decreeing "That the Defendants have and recover judgment against Plaintiff for the sum of $320.20, Defendants' costs and disbursements herein * * *."

VII. That the Court erred in not granting the relief prayed for in the Bill of Complaint for infringement of said United States Letters Patents No. 1,177,697 and No. 1,281,711.

ARGUMENT

On Infringement.

POINT 1.

The rules applicable to the construction of contracts generally apply to the construction of license agreements. 48 C. J. 266 (Sec. 415). Citing cases.*

POINT 2.

A contract must be interpreted by taking into consideration the contract as a whole, together with the matter to which it relates.

Civil Code of California, Secs. 1641, 1647;
Burdell v. *Denig,* 92 U. S. 722.

"It is certainly true, that, in construing a written instrument, it is necessary and admissible to look to all the surrounding circumstances of the transaction which are necessary to discover its meaning."

Burdell et al v. *Denig et al, supra.*

Having these established principles in mind, we now examine the contract in dispute.

---

* *Eskimo Pie Corp.* v. *National Ice Cream Co.*, 20 F. (2d) 1003 (affd. 26 F. (2d) 901); *Heaton-Peninsular Button-Fastener Co.* v. *Eureka Specialty Co.*, 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728; *Morse* v. *O'Reilly*, 17 F. Cas. No. 9,858, 4 Pa. L. J. R. 75, 6 Pa. L. J. 501; *Star Salt Caster Co.* v. *Crossman*, 22 F. Cas. No. 13,321, 3 Bann. & A. 281, 4 Cliff, 568; *Wetherill* v. *Passaic Zinc Co.*, 29 F. Cas. No. 17,465, 6 Fish. Pat. Cas. 50, 9 Phila. (Pa.) 385; *Bell, etc., Co.* v. *Spoor*, 216 Ill. A. 221.

POINT 3.

The contract of June 26, 1925 is essentially a lease of two specific motion picture film developing machines.

The two machines were built by plaintiff's predecessors under paragraphs 2, 3 and 4 of the contract (Tr. 26, 27), and installed in the defendants' laboratory in Hollywood.

The specific leasing clause is found in paragraph 5 of the contract (Tr. 27):

> "the party of the fourth part shall have the right to use, operate and maintain the said machines * * * in treating, processing and developing photographic films, and the parties of the first, second and third part agree to lease, and do hereby lease to the said party of the fourth part, the said machines * * * for the consideration hereinafter set forth."

All subsequent paragraphs in the contract relate to royalties, option to purchase, and costs and expenses incident to "operation and maintenance."

The lease contained no restriction prohibiting the use of the machines for developing negative film; but the machines were designed and built for processing positive film only (Tr. 108), and were so used by the defendant laboratory for several years (Tr. 62; Interrog. 19; Tr. 66, Ans. 19). During that period the laboratory developed negative film by other means (Tr. 99-100).

These circumstances indicate clearly that the parties intended the machines to be used for the development of positive film only.

The two machines in question are the property of the plaintiff, and remain so; and the defendants have "no

title or interest therein other than the right to the use thereof pursuant to the terms of this lease and license agreement"—paragraph 14 of the contract (Tr. 31).

Throughout the contract reference is made to only *two* machines. The lease and the license are co-extensive in that respect. The contract recites (Tr. 25): "WHEREAS, the party of the fourth part is desirous of acquiring a license to operate *two* machines * * *" and "WHEREAS, the party of the fourth part is desirous of having the parties of the first, second and third part construct and install *the two* machines * * * in the film laboratory of the party of the fourth part * * *"

There can be no doubt that the contract is a lease. Paragraphs 2 to 14, both inclusive (Tr. 26-32), constitute the lease. The provisions of these paragraphs, being all but one paragraph of the contract, are not alternative to any other provisions, but are mandatory; and the provisions thereof were carried out by the parties.

The *two* developing machines were manufactured, and installed, as required by the lease. The defendant laboratory had the right to **use** them, **operate** them, and **maintain** them, according to the terms of the lease—and had no other right with respect thereto.

POINT 4.

The license clause in the contract is subservient to the lease and is restricted thereby.

The license is contained in paragraph 1 of the contract (Tr. 25) in the following words:

> "hereby grant to the party of the fourth part the right, liberty and license to use two machines for treating, processing and developing photographic films for the full term of any and all of the aforesaid patents * * * and all other patents that may be

> granted * * * on the aforesaid patent applications or for any improvements thereon, for the consideration, period of time and *under the conditions hereinafter expressed.*"

The phrase "under the conditions hereinafter expressed" must necessarily mean the leasing provisions of the contract, as those provisions comprise the entire remainder of the contract.

The defendant Columbia Pictures Corporation acknowledged that the license is subservient to the lease, in answering plaintiff's interrogatory No. 8. The interrogatory reads (Tr. 61):

> "8—Is it true that on or about June 26th, 1925, William Horsley Film Laboratories, Inc., leased from Chester Bennett Film Laboratories, a California corporation, Frederick B. Thompson, and Grace Seine Thompson, two Spoor-Thompson motion picture film developing machines, and accepted in connection with said lease a license to operate said machines under certain patents, including United States Letters Patent No. 1,281,711?"

The defendant, by the sworn statement of Samuel J. Briskin, Assistant General Manager, answered this interrogatory as follows (Tr. 64):

> "Answer to Eighth Interrogatory:
>
> "I am informed that this is true and I am also informed that Cinema Patents Company, Inc., is now the owner of the license and lease agreement and the machines mentioned therein and that Wm. Horsley Film Laboratories still uses said machines, pursuant to the terms of said license."

Clearly the license is to use the two developing machines which the first party was required to and did manufacture

and install in the laboratory of the fourth party. The license and the lease are inseparable, referring to the same "two" machines. Since the license is granted "under the conditions hereinafter expressed" and this limitation refers definitely to the lease, the licensee's rights are restricted by whatever limitations appear in the lease.

Moreover the *only* right obtained by the defendants under either the license or the lease is the right to use.

This is true, even though the lease also contains the words "operate and maintain". These words are implied in the "right to use". To operate is an element of use, and to maintain is to service and repair.

The defendants here cannot read into their license an implied right to manufacture the two machines which they had the right to use, because the function of providing the machines is specifically delegated to the lessor.

POINT 5.

By manufacturing and building into one of the leased machines several years after the acceptance and continued use of the machines an additional developing unit by which the machine was adapted for developing negative film, the defendants "manufactured" within the meaning of the patent law: and therefore, acted beyond the scope of their license.

That the change was unauthorized is evident from the following (Test. of William Horsley, Tr. 92):

> "When we were about to make this other change which I have testified to, that is, the addition of the developing tank to the one machine, I requested the Chester Bennett Laboratories to furnish me with parts. They told me to write a letter on it. I wrote

a letter making the request but they never answered it; and they positively refused to let me have parts. The Chester Bennett Laboratories previous to my requesting these parts had been sold out to the Consolidated Film Industries, and they were the ones that refused to furnish me with the parts."

On re-direct examination, Mr. Horsley continued (Tr. 92-93):

"I have no copy of that letter I say I wrote asking for these parts. I left it in the office of Mr. George K. Spoor a year ago last November. I do not remember the date of the letter. It was about the month of May, 1929. In the letter I asked them to furnish me one extra section for my developing machine and also to state the price they would charge me. I told them I wanted to make the machine, or one section, longer to develop negative. I think I stated that in the letter, although I am not positive of it. Anyway, I made it clear to them that I wanted to put on another section on the developing end of the machine so that I could develop negative films. I received no reply to the letter. They ignored me completely. I wrote the letter to the Chester Bennett Laboratories. They were operating as the Chester Bennett Laboratories, Mr. George Yates, manager."

The two positive machines were operated by the lessee to develop 20,231,823 feet of film before the one was changed as complained of in this suit (Tr. 62, Interrog. 19; Tr. 66, Ans. to Interrog. 19).

The changes complained of were not to improve the operation of the machine (Tr. 63, Interrog. 23; Tr. 67, Ans. to Interrog. 23).

The acts complained of are summarized by Plaintiff's Interrogatory 12 (Tr. 61) reading:

> "12—Specify what repairs, replacements, changes, modifications, alterations or additions have been made upon each of said machines since first installed and operated, when and by whom and at whose order?"

and by the answer of defendant William Horsley Film Laboratories to this Interrogatory (Tr. 70) as follows:

> "Answer to Twelfth Interrogatory:
>
> "The machine shown in the left hand portion of Exhibit 'A'* attached hereto is the same as it was when originally installed. The machine shown in the right hand portion of said photograph has had added to it an enlargement of the developing tank, together with an extension of the main frame to support the same, a set of driving rollers, together with associated gears and shafts and a set of idle rollers. These were added in June or July of 1929, by order of William Horsley. * * * Both of the matters herein referred to were done by Mr. Horsley as President and General Manager of the corporation."

William Horsley, president of William Horsley Laboratories, Inc. until August 1929, testified:

> "The function of that additional developing section was to give us a longer period of development. It was customary in developing practice to give negative film the equivalent of four times as much developing time as positive film" (Tr. 90).

The positive machine has a capacity of 265 feet of 35 millimeter film in the developing unit (Tr. 62, Inter-

* See photograph opposite page 68 in the Transcript.

rog. 13; Tr. 65, Ans. to Interrog. 13) and the (altered) negative machine may contain twice as much, 530 feet, at one time (Tr. 62, Interrog. 14; Tr. 65, Ans. to Interrog. 14).

Since the one "positive" machine has been changed to a "negative" by the addition of a second developing unit, all the defendants' *picture negative* has been developed in the "negative" machine (Test. Seid, Tr. 98).

The positive machine (the one on the left-hand side of the picture, Tr. 68) was never used for developing negative film (Test. Horsley, Tr. 90); and is not suitable for developing negatives, in the opinion of plaintiff's expert Roscoe C. Hubbard (Tr. 108).

Seid (defendants' laboratory superintendent) made the point that the positive machine had been used to develop *sound track* negative, as distinguished from *picture* negative; but Horsley evidently did not regard sound track as *negative*, and even Seid admitted that the time of development of negative sound track runs close to the range of developing time for positive (Tr. 98); and he agreed with Horsley that they had never developed any picture negative in the positive machine (Tr. 99-100). When pressed by his own attorney during cross examination he responded by asserting that the positive machine *could be* used for developing negative picture film (Tr. 98), but he conceded on re-direct examination that the quality of the negative would be superior if developed in the negative machine (Tr. 100), and in that conclusion agreed with plaintiff's expert Hubbard, who said (Tr. 108):

> "As I see the machine shown on the left hand side of this picture 'A', it is not suitable for developing negatives. The machine on the right side can be used for developing negatives. Quite an advantage in result would be obtained by the use of the machine on the right side of the picture for develop-

> ing (negative) film over the use of the machine on the left side of the picture. That advantage would lie in the increased time in which film would remain in the developing solution. In order to obtain proper photographic quality in negative, it is necessary to develop at least three times as long as positive."

The trial Court, in its Rulings on Exceptions to Master's Report, stressed the point (Tr. 132) that the "licensee did not reconstruct any of the principal parts of the machine nor alter its method of operation".

That, however, is not consequential. The fact is that the defendants *built on* an extra developing unit which brought to the machine as a whole a new function. It could not possibly be said to constitute repair, as there was nothing to need repair. It could not be regarded as the replacement of worn parts, as the new parts did not take the place of any existing parts, but *added a new element* to the apparatus.

The acts complained of may not have amounted to "reconstruction" as defined in some of the cases; but they certainly did amount to "manufacture"; and the right to manufacture is one thing *which the license did not grant.*

This distinction the trial Court failed to note.

The Court said (Tr. 133) "the license agreement authorized the use of two machines in the processing of films in any way so long as that use was within the description of the invention as disclosed by the patents which were referred to in the agreement." Plaintiff concedes that the two machines, in their **original** form, may be used in any way so long *as that use is within the description of the invention.* But the Court's conclusion, which immediately follows, that: "the acts of the defendants did not constitute infringement", is not sound.

In reaching that conclusion the court wholly ignored the provisions of the contract having to do with the building, installing and leasing of the machines.

The right to build the machines was delegated absolutely to the licensors. The right to use is the only right granted by the license clause.

POINT 6.

It is fundamental that the "right to manufacture, the right to sell, and the right to use, are each substantive rights, and may be granted or conferred separately by the patentee." *Adams* v. *Burke,* 17 Wall. 456.

> "Any one or two of these rights may be expressly conveyed by a patentee, while the other is expressly retained by him." Walker, 6th Edition, Section 343.

To illustrate, a license to make and use does not authorize any sale of the thing so made and if the licensee sells the thing he infringes the right of the patentee and may be held for damages and enjoined. *United States* v. *General Electric Company,* 272 U. S. 476, 71 Law. Ed. 362.

The Circuit Court of Appeals for the Eighth Circuit summarized the rule in the following words: "It is the general rule * * * in patent cases that a limited license conveys only the rights defined therein and that if the licensee makes any other or different use, either as to time or place, than that authorized by the license he becomes an infringer and his limited license is no justification." *St. Louis Street Flushing Machine Co.* v. *Sanitary Street Flushing Machine Co.,* 178 Fed. 923, certiorari denied;

Sanitary Street Flushing Machine Co. v. *St. Louis Street Flushing Machine Co.,* 219 U. S. 588, 55 Law. Ed. 348.

Defendants may argue that an express license to use a patented device implies a right to make that device—which might be sound reasoning if the right to make had not been specifically retained by the patent owner—as it was here.

There was absolutely nothing wrong with the machines built and installed by the patent owner. On the contrary, "The machines had at all times operated satisfactorily in the development of positive film, I was quite enthusiastic about their operation, and I am yet" (Test. Wm. Horsley, Tr. 93).

The subsequent conversion of one of the positive developing machines into a negative machine was "not to improve the operation of the machine so far as the development of positive film was concerned. It was for the purpose of making the machine so that I could develop negative on it, and for that purpose only" (Test. Wm. Horsley, Tr. 93).

The defendants make no claim of right to the negative machine on the theory that its features are contained in other of plaintiffs' patents. The negative machine is distinctly *not* a patentable improvement over the positive machine. Both the positive and the negative machines fall, without patentable distinction, under the patents in suit. If one of the machines had been originally made with the capacity for developing negative film, this action would not lie. But—while the contract did not specifically mention positive machines by name—it was clearly the intention of the parties to provide for positive machines, and not negative machines. This is established by the fact that the Horsley laboratory accepted the machines *as installed,* and used them from 1925 or 1926 to the middle of 1929 for positive film only. As Mr. Horsley testified (Tr. 93):

"Prior to the time that I changed this machine

over I had not developed negative film on either of those two machines; I had, however, developed positive film on both machines, running into the millions of feet."

POINT 7.

As a principle of law, the lessee of a patented machine, in the absence of an express license enlarging the grant, should have no broader license than does the purchaser of a similar patented machine; and should be held to be an infringer under circumstances by which the purchaser becomes an infringer.

The closest authorities are cases defining rights of purchasers of patented articles.

A purchaser may use, repair and sell.

Here the lessee may *use, operate* and *maintain.* The terms "use" and "operate" are synonymous; and the word "maintain" means about the same as "repair". Thus the lessee here is given the same right of use and repair as has a purchaser and no more. The purchaser, however, also acquires the right to sell, with which we are not here concerned.

Two recent cases which approach the point are—*George Close Company* v. *Ideal Wrapping Machine Company,* 29 F. 2d (C. C. A. 1) 533; and *Miller Hatcheries, Inc.* v. *Buckeye Incubator Company,* 41 F. 2d (C. C. A. 8) 619.

In the first case the plaintiff was in the habit of furnishing candy cutting machines, all operating on the same principle, under the same patent, but providing different machines for cutting different *sizes of candy.* The defendant, after operating one machine for a while, asked the

plaintiff to furnish parts necessary to convert the machine into one for cutting larger caramels. This the plaintiff refused to do—as in the case at issue. The defendant in the reported case thereupon employed a machinist to reconstruct its machines so as to cut and wrap the larger caramel. This involved principally a substitution of a cutting wheel with eighteen knives instead of twenty-four, and spaced farther apart.

The Court recognized the old rule laid down in *Chaffee* v. *Boston Belting Company,* 22 Howard 217, 16 L. Ed. 240, that the machine purchased passed out of the limits of the patent monopoly; but held that the changing of the candy cutting and wrapping machine from one equipped to work with small caramels to one adapted to work with large caramels was a reconstruction constituting infringement. Quoting from page 534:

> "It is not and cannot be contended that such reconstruction does not destroy the identity of the machine purchased. Plainly it does; the reconstructed machine is, in the candy manufacturing art a new or different machine (producing a different result) from that manufactured and sold by the patent owner. Walker, Patents (5th Ed.), Section 302a. We can see nothing in the patent statutes as construed by the Supreme Court or by any other court to justify the contention that the defendant's acts did not constitute infringement. The defendant has made and is using the invention in a machine in substantial part made by it—not purchased from the owner of the patents."

By the soundest analogy the changing of a developing machine equipped for positive work, into a developing machine for negative work, causes the machine to produce a new result, and constitutes infringement of plaintiff's patents.

The Circuit Court of Appeals for the Eighth Circuit reaffirmed the rule, in *Miller Hatcheries, Inc.* v. *Buckeye Incubator Company, supra.*

There the defendants took incubators which had been sold by the plaintiff and changed them so they would accommodate more eggs, by putting twelve trays in the space where nine had been in the incubators as purchased. The defendants used the incubators after reconstructing them. The purpose of the change was to increase the capacity of the incubators and thereby reduce the number necessary to be bought.

The Court discussed most of the older cases usually advanced by the defendant under similar facts, and following *George Close Company* v. *Ideal, etc., supra,* held that there was infringement beyond question.

The Court called attention on page 621 (41 F. 2nd) to *Leeds & Catlin Company* v. *Victor,* 213 U. S. 325; 53 Law. Ed. 816 where the Supreme Court said:

> "The license granted to a purchaser of a patented combination is to preserve its fitness for use so far as it may be affected by wear or breakage. *Beyond this there is no license.*"

On page 622 the Court calls attention to *Goodyear, etc. Company* v. *Jackson* (C. C. A.), 112 Fed. 146, quoting from page 150:

> "A purchaser, then, may repair but not reconstruct or reproduce the patented device or machine. Repair is 'restoration to a sound, good, or complete state after decay, injury, dilapidation, or partial destruction'. Reconstruction is 'the act of constructing again'. Reproduction is 'repetition' or 'the act of reproducing'."

In conclusion the Court said on page 622:

> "Applying the principles announced in the foregoing authorities to the case at bar it is clear that the changes made in the incubators were not justified as repairs or replacements for repairs or replacement were not necessary. The incubators were new. * * * The reconstruction was in our opinion such as to destroy the identity of the incubators as they were received from the hands of the original vendor. By reason of the reconstruction they had become incubators of greatly increased capacity, but which embodied all the elements of the two Smith patents. We think the reconstruction clearly constituted infringement."

If decreasing the number of cutting blades on a candy cutting machine in order to cut fewer, and larger, pieces of candy, is infringement; and if adding some extra trays to an incubator to increase its capacity is an infringement; *a fortiori* is the conversion of a positive developing machine into a negative machine by the addition of a second developing unit an act of infringement.

POINT 8.

Plaintiff, by its licensing system, receives higher royalties on negative film than on positive; defendants' defiance of plaintiff's rights being the only exception.

Cinema Patents Company manufactures separate machines for positive and for negative developing (Test. Hubbard, Tr. 108): in the negative machines additional tanks are added for developer solution, additional rollers and mechanism are added to feed the film through these tanks.

In the Long Island Laboratory of Paramount Publix Corporation there are five positive machines similar to the positive machine in the defendants' laboratory, and there is one negative machine in the Paramount laboratory corresponding in the matter of number of developing tanks and associated mechanism with the *negative* machine in controversy (Test. Hubbard, Tr. 111). These five positive and one negative machines are owned by the plaintiff and leased to Paramount (Test. Morris J. Siegel, Tr. 113) on a royalty basis.

Plaintiff also leases machines to H. E. R. Laboratories, and to Consolidated Film Industries, and also licenses Consolidated to operate additional developing machines owned by Consolidated (Tr. 114). These lessees and licensees pay the plaintiff a higher royalty per foot on negative film than they pay on positive film (Tr. 115).

The defendants' contract, made in contemplation of positive developing, calls for a small royalty based on a single rate. By developing negative film, ostensibly under the contract, the defendants seek to obtain the advantage of the low rate, thus depriving the plaintiff of the additional income it would otherwise derive from its established practice of charging a higher royalty for the use of negative machines.

On Election of Remedies.

Prefatory.

In their Answers, defendants allege (Tr. 22, 57) that the plaintiff commenced an action against one of the present defendants, in the Superior Court of California, prior to filing the present bill. The defendants do not plead the effect thereof.

It is not denied that the action was brought, and that the First Amended Complaint is properly set forth (Tr. 34

et seq.). Moreover it is admitted that the Superior Court action is at issue and is now pending and has not been dismissed.

The First Amended Complaint must be read (Tr. 34 *et seq.*) to be fully understood. Numerous facts surrounding the agreement of June 26, 1925 (Tr. 23 *et seq.*) and subsequent happenings are alleged. The complaint prays (1) for an accounting under the contract, (2) for a declaration of forfeiture of the contract and return of the machines, (3) for declaratory relief and (4) for a restraining order (to be made a permanent injunction) prohibiting the defendant from using the machines to develop photographic film.

The plaintiff affirmed the contract by asking for an accounting; and certainly did not deny the contract by submitting the facts for judgment in the form of a declaration of the rights and duties of the parties.

Proceeding now to a brief argument, it is urged:

POINT 9.

The defense of election of remedies is not before this Court.

Judge James declined (Tr. 133) to pass on this question, saying that it was not necessary to discuss it in view of his decision on the issue of infringement.

The defense of election of remedies does not question the jurisdiction of the court. A court lacks jurisdiction only *when the court is without authority* to hear and determine issues on the merits.

If a plaintiff has, by an *omission* such as failure to bring suit until the statute of limitations has run, lost his right to bring and maintain an action, that fact, if raised as a

defense, goes to the merits, *U. S.* v. *Oregon Lumber Company,* 260 U. S. 290, 299. By analogy, if a plaintiff has by an *act,* such as choosing one of two inconsistent remedies, precluded his right to pursue the other remedy, that fact, if raised as a defense, also goes to the merits.

An Appellate Court will not proceed to determine merits on which the Trial Court has not passed. *Willard et al.* v. *Union Tool Company,* 8 F. 2d (C. C. A. 9) 264.

Should this Court decline to hold with plaintiff on Point 9, we then submit the following:

POINT 10.

The pendency of a prior suit in a state court is not a bar to a suit in a district court of the United States by the same plaintiff against the same defendant for the same cause of action.

Stanton et al. v. *Embrey, Administrator,* 93 U. S. 548, 554; 23 L. Ed. 983.

This doctrine has been reaffirmed by the Supreme Court whenever the question was before it: *Bryar* v. *Campbell,* 177 U. S. 649, 654; *Hunt* v. *N. Y. Stock Exchange,* 205 U. S. 322, 339; *Kline et al.* v. *Burke Construction Co.,* 260 U. S. 226, 230, and has been followed in eighty or more decisions of other federal courts, as reported in Shepard's Citations.

POINT 11.

No election of remedies occurred because plaintiff's two suits are not inconsistent.

The leading case on election of remedies seems to be *Robb* v. *Vos,* 155 U. S. 13.

Here the court announced the rule:

> "Any decisive action by a party with knowledge of his rights and of the facts, determines his election in the case of *inconsistent* remedies * * *"

The Supreme Court further expounded the doctrine in *United States* v. *Oregon Lumber Co.,* 260 U. S. 290, quoting with approval from *Robb* v. *Vos.*

In the *Oregon Lumber* case, the United States had brought an action to cancel land patents. The bill was dismissed (after trial) because barred by the statute of limitations. The present action was then filed to recover damages for fraud in procuring patents to public land.

Mr. Justice Sutherland said, page 294:

> "Upon the facts stated the sale was voidable * * * and the plaintiff in error was entitled to disaffirm the same and recover the lands or affirm it and recover damages for the fraud. It could not do both. Both remedies were appropriate to the facts, but they were inconsistent since the first was founded upon a disaffirmance and the second upon an affirmance of a voidable transaction. *Robb* v. *Vos,* 155 U. S. 13, 43; *Connihan* v. *Thompson,* 111 Mass. 270, 272, 2 Block on Rescission and Cancellation, Sec. 562, and cases cited."

In the infringement case here we allege acts done outside the scope of the license. Our prayer is to have those unauthorized acts stopped. There is no inconsistency in seeking such relief and also seeking the recovery of unpaid royalties for rights exercised by the defendants within the scope of the agreement. In neither case is the agreement disaffirmed.

Since the Superior Court action and the present suit *are consistent,* no election of remedies can have occurred.

This conclusion is strengthened by the fact that the infringement action lies whether the license agreement continues or is forfeited. If the agreement continues in force, the acts outside the license have been, and continue to be, infringements. If the agreement is declared forfeited, acts outside the license were infringements until the date of forfeiture and certainly continue to be infringements thereafter.

It must be remembered that in the present action plaintiff seeks redress for acts done outside the scope of the agreement—nothing more.

In the Superior Court case plaintiff did, it is true, pray for forfeiture of the agreement, as one of several alternative remedies. But even if this might have furnished a basis for a charge of inconsistency—which plaintiff denies, plaintiff was mistaken in believing that forfeiture, and an injunction, was its remedy, for in law, it had no such remedy.

Forfeiture of a license will not result "from the fact that the licensee has infringed the patent by doing acts, with the invention, which were unauthorized by the license. The license will not protect him in such things, but it will continue to protect him in doing the acts which it did authorize."

Walker, Sixth Ed., Sec. 357, page 435.

Citing:

Wood v. *Wells,* 6 Fisher 383, 1873;
Steam Cutter Co. v. *Sheldon,* 10 Blatch. 1, 1872.

Therefore, the modification of the developing machine, though constituting an act unauthorized by the license, was not, under the authorities, ground for forfeiture.

Consequently, plaintiff's prayer for termination of the contract—in the state court action—was not justified, on the facts. There was no remedy. Therefore there could be no election.

Moreover, taking a broader view of our own two cases, it is plain that in the first suit containing the prayer to cancel the license, the acts *herein* charged to be infringements were not treated as authorized acts but were treated as tortious acts. Nothing in that suit can be construed as an election by plaintiff to have waived the tort and to have regarded the tortious acts as licensed acts. This, the real test, is supported by *United States* v. *Oregon Lumber Co., supra.*

Respectfully submitted,

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Attorneys for Appellant.

New York City, October 14, 1932.

No. 6852.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Cinema Patents Company, Inc., a corporation,

Appellant,

vs.

Columbia Pictures Corporation, a corporation, and William Horsley Film Laboratories, Inc., a corporation,

Appellees.

BRIEF FOR APPELLEES.

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TOPICAL INDEX.

Corporation and William Horsley Film Laboratories Inc., Columbia Pictures Corporation being the owner of all the stock of the Wm. Horsley Film Laboratories. The bill charges infringement of two patents, to-wit, the Thompson patent No. 1,281,711 and the Gaumont patent No. 1,177,697, both addressed to film processing machines.

The charge of infringement is particularly directed to the use by defendants (the appellant and appellees are hereinafter referred to as plaintiff and defendants respectively) of two film processing machines in the Horsley Laboratories in Hollywood. These machines were installed and placed in operation in the Horsley Laboratories by the predecessor in interest of the present plaintiff under a certain "License Agreement," dated the 26th day of June, 1925. Subsequently, by assignment, the plaintiff acquired ownership of the patents named in the license as well as the license agreement.

The license agreement is in usual form, providing payment by the licensee for the machines to be charged against royalties, the payment of royalties to continue for the life of the patents (six in number), forming the basis of the license agreement. [R. pp. 23 to 33.]

This license agreement remains in force and effect.

The plaintiff by a suit filed in the Superior Court of California, at Los Angeles, prior to the filing of the present suit for infringement and as yet not having come on to be heard, prays the Court that defendant (appellee here) account to plaintiff for all photographic film developed, processed or treated in and by the said two machines and to "declare the license agreement terminated." [R. p. 46.]

Defendants have performed under the license and made accounting and paid royalty as therein provided until the present controversy, and have since offered both accounting and payment.

In the report of the Special Master, at page 122 of the Record, he stated:

> "The facts which are not in dispute are as follows: On June 26, 1925 an agreement—Defendants' Exhibit A, was entered into between the Chester Bennett Film laboratories, a Corporation, Frederick B. Thompson, Grace Seine Thompson of one party and William Horsley Laboratories, Inc. of the other party, whereby for a consideration the parties first mentioned agreed to install two motion picture film developing machines in the laboratory of the other party, and further granting a license to use the invention of several patents including, among others, the patents in suit and any future patents for improvements on the subject matter of the patents. The contract provided for the payment of certain rentals and royalties."

This is followed by the statement that the two machines were installed under the license agreement, that the rollers on one of them were changed by the licensee to accommodate a different width of film and an additional developer tank placed on one of the machines.

One of the acts of infringement charged was the machining of the grooves in the rollers in one or both of the machines so that it could handle film of 16 millimeter width as well as standard film of 35 millimeter width, and the other act was in constructing upon one of the machines an additional developer tank and then using it for developing negative film; the latter act of adding a developer

tank to one machine being the sole act of defendants now urged by plaintiff as an infringement.

Defendants set up the license agreement as a complete defense to the charge of infringement, that the acts complained of come within the terms of the license agreement, and, further, that the licensors have acquiesced in the alleged wrongful acts of the licensee.

In the opinion of Judge James [R. p. 131], at the bottom of page 132 of the Record, the lower court found that:

> "In order to better handle negative film, the licensee installed on one machine an additional tank to hold developing fluid and necessary rollers and gears to carry the film through such additional tank. It is because of this act that infringement is charged. *The licensee did not reconstruct any of the principal parts of the machine nor alter its method of operation.*" (Italics ours.)

And on page 133 found as its conclusion the following:

> "My conclusion is, after an examination of the record, that the license agreement authorized the use of two machines in the processing of films in any way so long as that use was within the description of the invention as disclosed by the patents which were referred to in the agreement. It follows that the acts of the defendants did not constitute infringement."

The question before this Court may be stated as follows: Did the Defendants in Placing an Additional Developer Tank on One of the Film Processing Machines and Using It for Developing Negative Film Act Within the License Granted Them by the License Agreement of June 26th, 1925?

ARGUMENT.

THE LICENSE AGREEMENT.

POINT 1.

The License Agreement of June 26th, 1925, Is Essentially a License Under the Patents Enumerated Therein to Use Two Machines for the Development of Motion Picture Film, Such License Being Co-extensive With the Monopoly Granted by the Patents, and, in Addition, Any Improvements Thereon.

The "License Agreement" appears in the record beginning at page 23. After designation of the parties, the recitals show ownership of certain patents and applications, the latter having since issued as patents. (See Plaintiff's Exhibit No. 2 and Defendants' Exhibit "C," "D," "E," "F" and "G," Book of Exhibits, p. 16 *et seq.*)

Then follows [R. p. 25] a recital that "the party of the fourth part is desirous of acquiring a *license to operate two machines for treating, processing and developing photographic films,* which machines and apparatus connected therewith are the invention of the said Frederick B. Thompson, and the subject of the aforesaid patents and patent applications." (Italics ours.) (The party of the fourth part referred to being the licensee, William Horsley Film Laboratories, Inc.)

The above is followed by the recital that the licensee is desirous of having the licensors "construct and install" the two machines.

These recitals are followed by the *granting clause* which reads as follows:

> "1. The parties of the first, second and third part do hereby grant to the party of the fourth part the right, liberty and license to use two machines *for treating, processing and developing photographic films* for the full term of any and all of the aforesaid patents granted to the party of the second part and all other patents that may be granted to the party of the second part on the aforesaid patent applications *or for any improvements thereon*, for the consideration, period of time and under the conditions hereinafter expressed." (Italics ours.)

This clause is followed by the provisions relating to the construction and installation of the machines on the property of the licensee, the accounting and payment of royalties. Attention is called to the fact that in the granting clause of the license agreement, quoted just above, that the licensee is granted "the right, liberty and license to use two machines for treating, processing and developing photographic films for the full term of any and all of the aforesaid patents" and "for any improvements thereon." Here is a specific grant of a right co-extensive with the monopoly of the patents, and, in addition, *the additional right to use any improvements thereon.*

Paragraphs 2, 3 and 4 relate to the building and installation of the two machines and are followed by clause 5. [R. p. 27.] Counsel for plaintiff, in his argument under "Point 3," page 11 of plaintiff's opening brief, omits from his quotation of clause 5 substantial matter materially bearing on the question here involved, the portion of the clause quoted by counsel reads in full as follows:

> "* * * the party of the fourth part shall have the right to use, operate and maintain the said machines, *apparatus and equipment in the said labora-*

> *tory of the party of the fourth part and for the purposes of the business conducted by the party of the fourth part at its said laboratory* in treating, processing and developing photographic films, and the parties of the first, second and third part agree to lease, and do hereby lease to the said party of the fourth part, the said machines *and apparatus connected therewith for the purpose and for the terms above stated*, and for the consideration hereinafter set forth."

The part omitted by counsel in his quotation is italicized in the above quotation, and has direct bearing on the questions here involved as setting forth the purposes for which the machines could be used under the license. The first omission in part reads—"for the purposes of the business conducted by the party of the fourth part at its said laboratory," and in the second omission the words "for the purposes and for the terms above stated" appear.

These clauses define the use of the machines and *place no limitation on what kind of film* could be developed by the licensee in the machines.

The Special Master found [R. p. 123] that the license granted was "to use the invention of several patents including, among others, the patents in suit and any future improvements," and the lower court found [R. p. 133], "that the license agreement authorized the use of two machines in the processing of films in any way so long as that use was within the description of the invention as disclosed by the patents which were referred to in the agreement."

A reference to certain of the licensed patents clearly shows that the machines shown therein could be used for treating both positive and negative film and that the in-

ventions of the patents are not limited to any particular size or number of tanks or any kind or size of film.

A brief reference to these patents reveals the following:

Patent No. 1,587,051, Defendant's Exhibit "G," Book of Exhibits, page 86, at page 92, lines 39 to 42 read:

> "It is to be understood that the units employed in this apparatus are variable in size and shape."

Patent No. 1,328,464, Defendant's Exhibit "C," Book of Exhibits, page 44, at page 54, lines 44 to 50 state:

> "it being understood, of course, that the construction of the embodiment illustrated and described may be changed and varied at will to suit the particular purpose for which the device is to be employed without departing from such invention as defined in the appended claims."

An examination of the licensed patents also discloses that such patents show different sized and differently constructed developing tanks. Patent No. 1,569,156 (Exhibit "F," Book of Exhibits, p. 76) shows a developer tank with two units therein, a unit being an upper and lower set of film carrying rollers, while patent No. 1,328,464 (Exhibit "C," Book of Exhibits, p. 44) shows a developer tank with only one unit.

The licensed patents cannot be construed as including any limitation as to being adapted to treat either negative or positive film, as, for instance, in patent No. 1,328,464 (Exhibit "C," Book of Exhibits, p. 44), it is stated on page 50, lines 13 to 15, that the invention relates to

> "apparatus for treating photographic film tape such as is used in the taking and projection of motion pictures."

This is also mentioned in the licensed Thompson patent No. 1,587,051 (Exhibit "G," Book of Exhibits, p. 86) and the licensed Thompson patent sued on. Anyone skilled in the art, to whom the patents are addressed, or in fact anyone in the general walks of life knows that film used in "taking" is negative film, and that film used in "projection" is positive film.

It is our contention that the license agreement is a grant to use two machines for processing motion picture film in any way so long as that use was within the description of the invention as disclosed by the patents which were set up as the basis of the grant in the license agreement, and that the only limitation of the use to which said machines can be put is that they must be used "for the purposes of the business conducted by the party of the fourth part at its said laboratory in treating, processing and developing photographic films," and that subservient to such grant the license agreement included terms for the installing of two machines in the plant by the party of the first part.

In construing the license agreement, the rules applicable to the construction of contracts generally apply, but it is also submitted that the rule stated by the Court in the case of *Ruckstell Sales and Mfg. Co. v. Perfecto Gear Differential Co.,* 28 Fed. (2nd) 407, at page 411, should be borne in mind which is stated as follows:

> "And, under the rule of conduct imposed, any question of uncertainty respecting the exact limits of the rights described in the license contract would of course be resolved in favor of the licensee."

The Question of Infringement.

The charge of infringement is directed to the addition by defendants to one of the original machines, as installed, an additional developer tank.

Plaintiff, in its opening brief on page 6, under the heading "The Issues," states its contention in these words: "Plaintiff contends that adding the second developing unit and using it for developing negative film is an infringement of the patents in suit."

The film processing machine consists of a series of tanks through which the film being treated is successively passed over rollers. The tanks are for successively developing and fixing the film, there being shown, for instance, in the Thompson patent sued on (Plaintiff's Exhibit No. 2, Book of Exhibits, p. 16) ten of such tanks arranged side by side. The original identity of the machine remains as installed. To the end of the series of tanks and beside the original developer tank another developer tank was added by defendant William Horsley Film Laboratories, Inc.

Plaintiff has not set up all the patents of the license agreement in its Bill of Complaint, but relies upon one of these patents, to-wit, the Thompson patent No. 1,281,711 (Plaintiff's Exhibit No. 2, Book of Exhibits, p. 16), and the patent to Gaumont No. 1,177,697 (Plaintiff's Exhibit No. 1, Book of Exhibits, p. 1), the latter patent being a patent acquired by successors to the original licensors.

Plaintiff in its brief, at page 6, "concedes that, so long as the defendants acted within the lease and license agreement, they enjoyed by operation of law the protection of the Gaumont patent as well as the Thompson patents mentioned in the agreement."

POINT 2.

By Placing an Additional Developer Tank at the End of One of the Licensed Machines, and Then Using the Machine to Develop Negative Film, the Licensee Acted Within the Rights Granted by the License Agreement and, by so Doing, Has Committed No Act of Infringement.

The present owner of the patents involved herein (plaintiff) is now making separate machines for developing negative film and positive film, and receives a greater amount of royalty per foot of film for the negative machine than the positive machine. For this reason, plaintiff is attempting to evade the obligations assumed by it when it acquired the license agreement in controversy along with the ownership of the patents referred to therein, and seeks this means of having the license agreement terminated.

Plaintiff, in its opening brief on page 24, makes it a point (Point 8) that plaintiff receives a higher royalty for negative film than for positive film. There is no evidence that such was the case when the license agreement was entered into, so such fact has no bearing on the present controversy. It is important to note also that there is no evidence showing that the original licensor made separate machines for developing negative and positive film at the time the license agreement was entered into.

The original parties to the license agreement had no misunderstandings as to their intent and the meaning of the license agreement; it was made in good faith and complied with in all its terms and conditions by the licensee. The real complaint of the present owner, it now appears,

is directed to the use of the machine involved for developing negative picture film, in the face of the fact that *no limitation appears in the agreement as to the kind of film to be processed,* and in the face of the uncontradicted testimony of Mr. Horsley himself, one of the contracting parties, that the machines were

> "intended to develop any kind of film that I chose to put on them." [R. p. 88.]

The placing of an additional developer tank at the end of the machine did not change the function of the machine nor its mode of operation. All it did was to permit the film to remain for a longer time in the developing solution so that any film requiring a longer developing period could be accommodated on the machine. Both machines could be used for developing picture negative, according to the testimony, but the additional developer tank permitted such film to be handled in shorter time than in the old machine. This was nothing but facilitating the use of one of the machines in the business of the licensee.

Mr. Horsley testified [R. p. 91]:

> "The method employed for developing negative film is the same as that employed for developing positive film, except for the longer period of time required for developing the negative. So far as the operation of the machines is concerned they are identical."

Mr. George Seid also testified [R. p. 100] that the machine operated the same with the additional developer tank as the one without it.

The question resolves itself into this:

The plaintiff, having sued for infringement on *one of the licensed patents,* must now show *some limitation in the*

license and *some act on the part of defendants outside of that limitation* and yet within the patent to sustain the charge of infringement.

It is our contention that the licensee has the right to change the size of any tank, add additional rollers, adapt the rollers to carry different sized film, add a tank or tanks, as long as such additions or changes come within the licensed patents; in other words, the licensee may do whatever may seem advisable or necessary to improve the operation of the two machines, increase their capacity or do any other thing necessary for carrying out the business of the licensee in the treatment of motion picture film, regardless of whether it is negative or positive, or wide or narrow film. Let us suppose that the now standard 35 millimeter film should suddenly become displaced by film 65 millimeter wide, must the licensee discard the two machines, for which the sum of $16,500.00 was paid, according to the licensee agreement, and get two new machines, or could the licensee place new and wider rollers on the machines? There is certainly nothing in the license agreement to prohibit such change.

A license under a patent grants immunity to the licensee from suit for infringement for those things done by the licensee under the license, and carries with it whatever further license may be necessary to make full enjoyment of the license effective.

As stated by the Circuit Court of Appeals for the First Circuit, in 280 Fed. 753, at page 758:

> "It is a maxim of the common law that one, granting a thing, impliedly grants that without which the thing expressly granted would be useless to the

> grantee. This maxim is as applicable to grants of patent rights as to other species of property. Steam Stone Cutter Co. v. Shortsleeves, 16 Blatch, 381 Fed. Cas. No. 13334; Brush Elec. Co. v. California Elec. Light Co., 52 Fed. 945, 960, 3 C. C. A. 368."

Plaintiff apparently does not, in fact, object to the act of the licensee in placing an additional developer tank on the machine, *but objects to the use of that machine for developing negative picture film.*

Now the evidence is that either machine, that is, the one with the additional tank or the one without such tank, can be used for developing negative picture film, the only difference is that it would take longer in the machine without the additional tank. However, plaintiff claims that the two machines were licensed only for development of positive film. *An examination of the license agreement discloses no limitation as to the kind of film to be treated other than "photographic film."*

"Photographic film" is commonly understood to mean film such as is placed in a camera for picture taking, in other words, *negative film.* What has been referred to throughout the case as *positive film is a print taken from the negative* and used for projection of the picture. In one of the licensed patents, to-wit, No. 1,587,051 (Defendants' Exhibit "G") photographic film tape is defined as "such as is used in the taking and projection of motion pictures."

Giving plaintiff the benefit of the doubt (if any exists), the term "photographic film" used in the license agreement may fairly be said to include positive film along with negative film.

At least six times in the license agreement the use to which the machines are licensed is stated as "for treating, processing and developing photographic films."

The only limitation in the license agreement on the use of the machines is stated as follows [R. p. 27]:

> "the party of the fourth part shall have the right to use, operate and maintain the said machines, apparatus and equipment in the said laboratory of the party of the fourth part and *for the purposes of the business conducted by the party of the fourth part at its said laboratory in treating, processing and developing photographic films.*" (Italics ours.)

Having been given the express license to use the machines for "developing photographic films," which includes both negative and positive film, the use of one or both machines for developing negative film is not an infringement of the patents in suit.

This leaves for consideration whether the act of building the additional developer tank and connecting such tank to the developer tank on the machine is an act of infringement. In an attempt to sustain this charge of infringement, plaintiff gropes blindly into the field of "repair and reconstruction" which is that branch of patent law relating to the rights of a person who has acquired a patented machine by absolute sale.

The facts in the present case in this connection are as follows:

The machine complained of remains the same as originally installed, and still has its original developer, fixing and washing tanks, etc. It has the same structure and the same mode of operation. What the licensee did was to make another developer tank and place it against the

first developer tank on the machine and run the film first through the new tank and then through the original machine.

The law of repair and reconstruction may be fairly stated as follows: The purchaser of a patented machine, by absolute sale, may repair broken and worn out parts so long as the original machine has not become so worn or destroyed as to lose its original identity, anything beyond repair, as defined, being unpermitted reconstruction.

In this case, the licensee has repaired the machine as required, which acts have not been questioned, but the licensee has not reconstructed the original machine *as it remains the same as installed.*

What the licensee has done is to improve the operation of the machine only as to time required for treating the film, in other words, improved the operation of the machine, which is permissible even in the case of an absolute sale, as enunciated by the Supreme Court of the United States in the case of *Mitchell v. Hawley,* 16 Wall. 544, 21 L. Ed. 322:

> "Sales of the kind may be made by the patentee with or without conditions, as in other cases, but where the sale is absolute, and without any conditions, the rule is well settled that the purchaser may continue to use the implement or machine purchased until it is worn out, or he may repair it *or improve upon it* as he pleases, as in the same manner as if dealing with property of any other kind." (Italics ours.)

One of the cases relied upon by counsel in his brief, under his discussion of "Point 7" (Plaintiff's, Appellant's brief, p. 21) recognizes that a purchaser may improve on

the purchased machine, to-wit, the case of *Miller Hatcheries Inc. v. Buckeye Incubator Company,* 41 F. 2nd (C. C. A. 8) 619, at page 621, states:

> "The purchaser of a patented device has the right to repair the device by replacement of unpatented worn out parts; *he may also, within certain limits, change the device so as to make it adapted to his particular use.*" (Italics ours.)

In the present case the lower court found [R. p. 132]:

> "The licensee did not reconstruct any of the principal parts of the machine nor alter its method of operation."

In this case what the licensee did is not a patentable improvement. Plaintiff in its opening brief at page 20 states

> "The negative machine is distinctly *not* a patentable improvement over the positive machine."

Plaintiff also refers in this connection to the case of *George Close Company v. Ideal Wrapping Machine Company,* 297 F. 2nd (C. C. A. 1) 533. Neither of the above cases relied on by plaintiff is pertinent. *In both cases, the structure of the original devices were reconstructed,* but in the instant case, the original machine was not reconstructed and Judge James in his conclusions so stated.

We have sought a reported case in which the facts were parallel to those of the instant case but have found none, but, if the law pertaining to the rights of owners of patented machines acquired by absolute purchase is to apply to the present case, the fact that such law as stated by the Supreme Court in the case of *Mitchell v. Hawley* (quoted above) recognizes the right of such owner to improve the machine, or, as said in the case of *Miller Hatcheries Inc.*

v. Buckeye Incubator Company, above quoted, to "change the device so as to make it adapted to his particular use," then the addition of a developer tank, as done by licensee in this case, is fairly within the rights of the licensee and not an infringing act.

Plaintiff in its precise statement (Plaintiff's Opening Brief, p. 6) of what acts of defendants are charged to infringe does not charge that the making of the additional tank is an infringing act, but that adding the tank to the old machine and then using the machine for developing negative film, is an infringement.

On page 6 of plaintiff's opening brief, counsel has stated that:

> "The defendants admit that the altered machine and the use thereof is covered by the patents in suit, but assert that they acted within the said agreement of June 26th, 1925."

This should properly be stated that defendants admit that the machine, either with or without the additional developer tank for processing either positive or negative film, is covered by the patents set up in the license, but assert that they acted within the license.

There has been no evidence introduced in this case to show that the individual developing tank made by the licensee is an infringement of any claim in *either* of the patents sued on. Placing the tank in connection with the original developer tank on the machine is not an infringing act, consequently, using the machine with its original mode of operation to develop photographic film, whether positive or negative, is clearly within the license and not an infringement of the patents sued on.

ACQUIESCENCE.

POINT 3.

Plaintiff's Predecessors, Having Had Knowledge of the Acts Complained of Herein and Acquiesced Therein, Plaintiff Is Bound Thereby.

This bill of complaint in this suit charged infringement, not only on account of the addition of a developer tank to one machine, but also on changes made to the film carrying rollers on one of the machines so that the machine could treat or handle a film of different width from that for which the machine was originally designed. When Mr. Horsley wanted to change the machine to handle 16 millimeter film as well as 35 millimeter film, he asked the licensor, Chester Bennett Film Laboratories, for parts, and was furnished with the parts.

When Mr. Horsley wanted to place an additional developer tank on the machine, he requested the same original licensee for parts, but was refused and told to write to George K. Spoor, who had, prior to this latter request, acquired the patents. Mr. Horsley testified: "I made it clear to them that I wanted to put on another section on the developing end of the machine so that I could develop negative film." [R. p. 92.] This was in May, 1929.

Mr. Horsley received no reply so he had the work done himself. *Mr. Horsley did not ask permission to develop negative film nor did he ask permission to add* a developer tank. He asked for parts from the natural source to get them, that is, from the parties engaged in building such parts.

Mr. Horsley acted within his understanding of the meaning of the license agreement and made the addition as

he believed he had a right to do. The licensor, well knowing what Mr. Horsley was doing, should *at that time* have objected, but, by remaining silent, the present licensor is in no position to protest.

Not only did the licensors not object to the licensee's use of the one machine for treating negative film, but the licensors accepted royalty payments for the negative film processed. [Testimony of Mr. Horsley, R. p. 94] during the two months after the developer tank was added until he left the Horsley Company in the fall of 1929.

ELECTION OF REMEDIES.

POINT 4.

By First Bringing Suit in the Superior Court on the License Agreement, Plaintiff Has Made Its Election of Remedies and Cannot Now Maintain a Suit for Infringement.

Plaintiff, in its opening brief, discusses this subject under Points 9, 10 and 11, beginning with page 25.

Under Point 9, plaintiff states that the question is not before this court as this court will not determine merits on which the trial court has not passed, citing the case of *Willard et al. v. Union Tool Company,* 8 Fed. 2nd (C. C. A. 9) 264. This case is not at all in point for the reason, as will appear from the opinion of the court, that the appellant in that case requested the District Court to deny his motion. Obviously, where a party in the trial court requests a particular ruling by the trial court, he cannot complain of the ruling upon appeal.

Under Point 10, plaintiff asserts that the pendency of a prior suit in a state court is not a bar to a suit in a Dis-

trict Court of the United States by the same plaintiff against the same defendant *"for the same cause of action."*

The rule does not here apply as the two actions in the present controversy are not *"the same cause of action."* The state court action is based on contract; the action in the District Court is based on tort, and, for this reason, the cases cited by plaintiff are not in point.

Under Point 11, plaintiff states that no election of remedies occurred because plaintiff's two suits are not inconsistent. It is submitted that a reference to the complaint filed by appellant in connection with the Superior Court action, which said complaint is attached to the answers of appellees and therein marked and referred to as Exhibit "B" [R. p. 46], will affirmatively show that appellant, in the action in the state court, brought its suit directly upon the contract as for a breach of the contract and in its prayer for relief asked the court to decree that defendant in that action be required to account to the plaintiff (appellant here) for all photographic film developed, processed or treated in and by the said two machines. The prayer for relief in the state court action likewise sought a declaration by the court that the license agreement be terminated and that the court further make a declaration of the rights and/or duties of the said parties to the said license agreement.

This is a positive showing that in the state court action the identical acts which are alleged to be acts of infringement in the case at bar were alleged and set forth in the action in the Superior Court in a cause of action based on the contract. Plaintiff, appellant here, sought relief in the state court action directly upon the contract and, hav-

ing done so, it elected its remedy and should be barred from pursuing the action in the case at bar.

In the case of *Indiana Manufacturing Co. v. Nichols & Shepard Co.,* 190 Fed. 579, at page 583, the Court stated:

> "I think the patent lessor who conceives that the lessee is operating outside of the agreed field has his election. He may disregard the license and proceed as for infringement; or he may, if he can show that he has no sufficient legal remedy, demand from a court of equity a decree for specific performance. He cannot do both, because the two are distinctly inconsistent."

A recent case of *American Pastry Products Corporation v. United Products Corporation,* 39 F. (2nd) 181, is that a party cannot rely on the same act as a tort and a breach of contract. This case reviews the Supreme Court decisions and other cases and states as follows:

> "The proper test is, I think, that, if there is an outstanding license on the face of which the defendants' conduct is authorized, in other words, if it is within the scope of the license, the matter is one of contract, and infringement proceedings against the licensee cannot succeed. The effect of such an agreement is to supersede the injunction *pro tanto* as long as the agreement continues in force. It cannot be open to the plaintiff to hold onto the injunction, and at the same time agree that it may be violated, nor to use the court's writ as a means of punishment for breach of contract. Nor can the plaintiff rely on the same act as being both a tort and a breach of contract. This is so, not because of the artificialities of pleading—as to which see a strikingly able and complete note to Cockerell v. Henderson, 50 L. R. A.

(N. S.) 3—but for a much deeper reason, viz., that the law will not permit a party to maintain inconsistent positions on matters of fact, asserting one thing today and another thing tomorrow. Cases collected 4 L. R. A. 148 note. There are many common instances of this rule. Familiar ones are that a party who has waived a tort and sued in assumpsit for the damages cannot thereafter sue in tort for the same injury, nor vice versa; and that, if a contract be fraudulently procured, the injured party cannot have both an action upon the contract and an action in tort for the fraud. Cases on alternative remedies collected 4 L. R. A. 145, note.

The present plaintiff may have been entitled to elect whether to hold the contract or to forfeit it, as was said in Luckett v. Delpart, *supra;* but he cannot have it both ways."

CONCLUSION.

It is submitted that Judge James in his conclusions quite properly and fully disposed of plaintiff's claim. His conclusions are sound, both in fact and law, and should receive the approval of this Honorable Court by its affirmance of the decree entered herein.

Respectfully submitted,

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Attorneys for Appellees.

No. 6852.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Cinema Patents Company, Inc., a corporation,

Appellant,

vs.

Columbia Pictures Corporation, a corporation, and William Horsley Film Laboratories, Inc., a corporation,

Appellees.

PETITION FOR REHEARING.

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TOPICAL INDEX.

TABLE OF CASES AND AUTHORITIES CITED.

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PETITION FOR REHEARING.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The defendants, appellees, Columbia Pictures Corporation, and William Horsley Film Laboratories. Inc., believing themselves aggrieved by this court's decision filed December 19th, 1932, come now and respectfully petition this court for a rehearing on the following grounds:

POINT I.

The Court Erred in Holding That the License Agreement Covered "Machines Capable of Developing Only Positive Films." (Opinion page 4.)

The uncontradicted testimony of Mr. Horsley [Rec. p. 94] and Mr. Seid [Rec. p. 98] shows that negative film can be developed in the machine without the additional tank, and that the operation of the machine is the same. Consequently, the original machine was capable of developing negative film.

The same remarks apply to the holding of the court on page 2 of its opinion that the "machines at the time of the execution of the lease were equipped with tanks suited only to the development of positive film."

There is no evidence in the case to support the holding of this court on page 2 of its opinion that the machines had been "designed, built and installed in the Wm. Horsley Laboratories for developing only positive film."

Mr. Horsley testified on direct examination by plaintiff's counsel [Rec. p. 88] as follows:

> "Q. When those machines were originally acquired and installed in the laboratory what size film were they adapted and intended to develop? A. Intended to develop any kind of film that I chose to put on them."

The fact that the machines were originally run with only positive film does not affect the interpretation of the license agreement, but, if held otherwise, the court should take into consideration the fact that upon one of the machines *without the additional tank* thousands of feet of *negative sound track film were run* at the rate of from

six to ten thousand feet per night under a different treatment than given positive film, and that the machine now complained of was changed prior to the addition of the extra tank to accommodate 16 mm as well as 35 mm film.

In its opinion this court said:

> "It is clear from these provisions of the lease that the only right granted to the defendants is the right to use the machine which the plaintiff had designed, built and installed in the Wm. Horsley Laboratories for developing only positive films."

This statement by the court is clearly erroneous and is violative of every rule for the construction of contracts with which we are familiar. It is undoubtedly the law that courts cannot make contracts for parties, nor can they add to or take from the solemn agreement of the parties as expressed in the writing.

In the case of *Union Iron Works v. Outer Harbor Dock & Wharf Co.,* 168 Cal. 81, the court said:

> "These sections of the code simply enact the common law rule, and it is not within their contemplation that a contract reduced to writing and executed by the parties shall have anything added to it or taken away from it by such evidence of 'surrounding circumstances.' The rules of evidence embodied in such sections is invoked and employed only in cases where upon the face of the contract itself there is doubt, and the evidence is used to dispel that doubt, not by showing that the parties meant something other than what they said, but by showing what they meant by what they said.
>
> "Where the parties have reduced to writing what appears to be a complete and certain agreement embodying a legal obligation, it will, in the absence of

> fraud, accident or mistake, be conclusively presumed that the writing contains the whole of the agreement between the parties, and parol evidence of prior, contemporaneous or subsequent conversations, representations, or statements will not be received for the purpose of adding to or varying the written instrument."

In *Cannon v. Selmser,* 85 Cal. App. 783, the court said:

> "Parties are bound by their written contract. . . . Courts have no power to make contracts between the parties, or to say what the parties intended by the contract, where its provisions are definite and certain."

The parties who executed the agreement involved in the case at bar were all well versed in the art of motion pictures. It is plain that they knew the difference between "negative" and "positive" photographic film, and if there had been any agreement between the parties that the machines here involved were to be used only for the purpose of processing positive photographic film, it is reasonable to suppose that they would have employed language designed for that purpose. This they did not do. There is absolutely no uncertainty or ambiguity in the use of the term "photographic film", and this court cannot now say that the parties agreed to use the machines only for the processing of positive photographic films, as such a construction does violence to the plain words of the contract itself and amounts to the making of a new contract for the parties by the court.

One of the two machines installed by plaintiff's predecessors has in no way been altered or changed. If a new development solution were to be now perfected so that

negative photographic film could be speedily and efficiently developed in that machine, could this court possibly hold that the defendant does not have the right to use that machine for developing negative film? The contract itself is clear, unambiguous and certain and says in certain and definite language that "photographic film," without limitation or restriction, may be processed in these machines.

We respectfully submit that the holding of the court to the contrary is plainly erroneous and is violative of all rules for the construction of contracts.

POINT II.

The Court Erred in Holding That the Present Practice of the Present Owner (Plaintiff) of the License, of Making Separate Machines for Developing Negative Film, at a Higher Rate of Royalty, Is Determinative of Any Rights of the Parties Under the License Agreement. (Opinion page 5.)

There is nothing in the nature of a license in writing to place it outside the well known rules of construction which are applicable to other contracts in writing. The Circuit Court of Appeals for the Eighth Circuit in the case of *Westinghouse Electric & Mfg. Co. v. Tri-City Radio Electric Supply Co.*, 23 Fed. 2nd 628, at page 630, states the law clearly on the point under discussion in the following language:

> "Licensees contend that a course of dealing pursued by them with the knowledge and consent of the licensor should be accepted by the court as a practical construction of the license by the parties themselves. But the only place the conduct of the parties

> can have in construing a contract is as one of the recognized rules or means of construction where the contract is, within its four corners, ambiguous in some respect. Where the contract itself is clear and complete there is no room for any extraneous rules of construction. The court must take the words as it finds them and give them their usual meaning. It cannot alter nor shade such meaning and thus declare that the parties meant other than they plainly stated."

The fact that the *present* licensor is making separate machines and charging a higher royalty for use of such machines, can have no bearing in placing a construction on the license agreement for determining whether the acts of defendants are outside the license. There is no evidence in the case to show that the original licensors followed such practice or that they built separate machines for processing negative film. What the present licensor is now doing with the patents has absolutely no bearing upon the rights of the parties to the contract and was improperly considered by the court.

POINT III.

The Court Erred in Holding That the Act of Defendant in Building an Additional Developing Tank and Adding Such Tank to the Machine Amounted to an Invasion of the Licensor's Right to Manufacture. (Opinion page 3.)

The right to "manufacture" retained by the licensor is *the right to manufacture the patented machine.* Defendants did not build a new machine and thereby invade the patent monopoly; they built but one unit of the machine and no evidence has been introduced in this case to show

that the manufacture of a single unit infringes any patent in suit.

We believe that the court, in arriving at its conclusion that defendants' acts have amounted to "manufacture," has been misled into applying the law of the cases appearing on page 4 of the court's opinion to the facts in this case to which, we respectfully submit, such law does not apply as the rights of the parties herein are to be found within the four corners of the license agreement only. Only one of the cases cited by this court in its opinion on page 4 involves rights acquired by the defendant under a license agreement.

Referring first to the opinion of the Eighth Circuit Court of Appeals in the case of *St. Louis Street F. M. Co. v. Sanitary Street F. M. Co.*, quoted in this court's opinion, in the case referred to, *the licensee specifically violated a prohibitive condition of* the license.

The subject matter involved was "9 London wagons" which were delivered "upon condition that they were not to be used within the United States." This was an oral license which does not detract from its binding character, but, in that case, was supported by a written receipt stating, "I also agree that these machines will not be used within the limits of the United States."

It was with particular reference to this direct violation of a covenant that the court expressed itself in the words quoted by this court from that opinion, and attention is called to that portion of the quotation which states "that if the licensee makes any other or different use, either as to time or place, than that authorized by the license, he becomes an infringer, and his limited license is no justifi-

cation," the court having found that the defendants used these "9 London wagons" in the United States in violation of the specific prohibition of the license.

The two following cases cited by this court in its opinion are cases involving rights acquired by a purchaser of a patented article and do not involve the interpretation of a license agreement.

Take first the *Miller Hatcheries v. Buckeye Incubator Co.* case, 41 Fed. 2, 619, cited by this court. In the incubator case, the court found "reconstruction," that is, a *rebuilding of the original machine.* This appears in the opinion of the court, beginning in the last paragraph on page 620, and reading as follows:

> "Defendants took the incubators which they had bought from plaintiff Buckeye Company and rearranged the interior, inserting twelve trays in the space where nine had been in the incubators as purchased. This involved numerous alterations, among them, recessing at the under sides the horizontal webs or plates of the end slats of the tilting sections; detaching the side member bars from the tray supporting rails; drilling holes in the side member bars for use in connection with the additional tray rails; making or purchasing additional tray rails; making or purchasing additional trays; attaching the side member bars to the old and new tray rails; enlarging the ventilators."

From this, it will be seen that *not only were the original machines largely dismanteled, but the corresponding parts of the same were changed and new parts added.*

This class of cases comes under that portion of the law relating to the *sale* of patented articles, where the patentee

has parted with title to the patented article, and the question to be determined is what are the implied rights of the *purchaser* acquired by virtue of his purchase? These rights are the rights to repair the machine but not to reconstruct it.

But even in this class of cases, the Circuit Court of Appeals in the Incubator case has stated the rule which, if applied to this case, would clear the licensee here of any charge of infringement. This statement of the rule is found on page 621, and reads as follows:

> "The purchaser of a patented device has the right to repair the device by replacing unpatented worn-out parts; *he may also, within certain limits, change the device so as to make it adapted to his particular use.* Thomson-Houston Electric Co. v. Kelsey etc. Co. (C. C. A.), 75 F. 1005, 1010; Aiken v. Manchester etc. Works, Fed. Cas. No. 113; Wilson v. Simpson, 9 How. 109, 125, 13 L. Ed. 66." (Italics ours.)

The attention of the court is called to the italicized part of the above quotation. This is exactly what has been done in the instant case before the court. There has been *no reconstruction of the original machine* as it still retains its original identity, but there has simply been an addition to it which makes it "adapted to his particular use." *In other words, reconstruction goes to the structure of the original machine; in the present case the structure of the original machine, as installed, remains the same.*

In the Incubator case, the court further said, on page 622:

> "The incubators were new. Nor were the changes made in order to make the incubator adaptable for

special use of the defendants. No such special use existed."

The essence of the opinion, in so far as this case of reconstruction was concerened, is also found on page 620, where the court states:

> "The reconstruction was, in our opinion, such as to destroy the identity of the incubators as they were received from the hands of the original vendor."

Referring to another case cited by this court in its opinion, the case of *George Close v. Ideal Wrapping Machine Co.*, 29 Fed. 2, 533, the question involved caramel wrapping machines. The court stated:

> "The plaintiff, patent owner, manufactured each machine to cut and wrap caramels of one size only—stated on the name-plate of the machine, together with references to the patents." (Page 534.)

Defendant *purchased* machines which cut a certain size caramel and employed a machinist to change its machines so as to cut and wrap larger caramels.

In this case, as in the Incubator case, the reconstruction involved a change *in the essential parts of the machines.* This is better pointed out in the opinion on page 534, as follows:

> "This reconstruction involved the substitution of a cutting wheel, with 18 knives instead of 24; and, as noted above, the step-by-step mechanism, the pockets in the wrapping device, and other essential parts of the machine, had either to be built over, or new and different parts substituted for the parts in the machines when purchased. The question is whether

> such reconstruction was infringement. We agree with the conclusion of the court below that it was."

And again, we have the rule stated in this case by the Circuit Court of Appeals for the First Circuit as follows: "It is not, and cannot be, contended that such reconstructions do not destroy the identity of the machine purchased." The court further says:

> "The defendant has made, and is using, the invention, *in a machine in substantial part made by it*—not purchased from the owner of the patents." (Italics ours.)

The facts of that case also demonstrate that in the instant case before this court, the rule of law enunciated in such case with reference to machines *sold,* not licensed, does not apply, as there has been no loss of identity in the original machine, it remains the same in construction throughout as when originally acquired.

With reference to the last case cited and quoted by this court, in its opinion on page 4, that is, the case of *Leeds & Catlin Co. v. Victor Talking Machine Co.,* the quotation refers to the implied rights of a *purchaser* of a patented machine and not to rights acquired under a license agreement.

That case had for consideration the question of whether or not the manufacture and sale by unauthorized persons of disc sound records for use on patented sound reproducing or talking machines was an infringement. The patent covered, as an element of the combination, the disc record; in fact, the court stated that

> "if a comparison may be made between the importance of the elements, as high a degree (if not a

> higher degree) must be awarded to the disc with its lateral undulations as to the stylus. It is the disc that serves to distinguish the invention,—to make the advance upon the prior art."

In other words, what the defendant was doing, and what the plaintiff complained of, was the unauthorized manufacture and sale of the *principal element* of the combination to owners of talking machines. The court stated that this was not repair, as disc records had a long life and were really furnished more frequently in order to increase the repertory of tunes than as substituted for worn out records.

In the case before this court, the lower court found that "The licensee did not reconstruct any of the principal parts of the machine nor alter its method of operation." [Record, p. 132.]

We offer that none of these cases are pertinent to the case at bar, and we repeat our statement made on the oral presentation of this case to the court that we have been unable to find a case in which the facts were coincident with those of the instant case, but, if any of the law of these cases is applicable, it is that portion of the Miller Hatcheries case, quoted above, where the court states: "He may also, within certain limits, change the device so as to make it adapted to his particular use." That is what has been done in the present case, the original machine has not lost its identical structure, consequently, it has not been reconstructed.

This is in line with the Supreme Court case of *Chaffee v. Boston Belting Co.*, 63 U. S. 217, which states:

> "By a valid sale and purchase, the patented machine becomes the private, individual property of the purchaser, and is no longer protected by the laws of the United States, but by the laws of the state in which it is situated. Hence it is obvious that if a person legally acquires a title to that which is the subject of letters patent, he may continue to use it until it is worn out, or he may repair it or improve upon it as he pleases, in the same manner as if dealing with property of any other kind."

To find that the defendants have invaded the patent owner's exclusive right to manufacture, some act outside the license, and in itself an infringement of the patents, must be proven. Plaintiff has not charged that the manufacture alone of the additional unit is an infringing act. The original machine remains the same as to structure and mode of operation, and, consequently, the addition of the developing unit to the old machine is not a "manufacture" of the patented thing under the law of the cases cited by this court.

The finding of the court, that the defendants have "manufactured," cannot be sustained on a charge that such act violates the license, because there is nothing in the license prohibiting the manufacture of a separate tank, nor can it be said that to build a separate tank is an infringing act aside from the license because there is no charge by plaintiff that such an act is an infringement.

POINT IV.

The Court Erred in Holding That the Addition of a Development Tank "Brought to the Machine as a Whole a New Function." (Opinion page 3.)

The Supreme Court in the case of *Risden etc. Locomotive Works v. Medart,* 158 U. S. 68, throws light on the meaning of the word "function" in the following statement:

> "It is equally clear, however, that a valid patent cannot be obtained for a process which involves nothing more than *the operation of a piece of mechanism,* or, in other words, *for the function of a machine.*" (Italics ours.)

It is in view of the above finding of this court that it concluded that, "This act amounted to a 'manufacture.'" *The only thing accomplished by adding the tank to the machine was to permit negative film to be developed on the machine in a shorter time than it could be developed without the additional tank.*

This is not giving a new function to the machine as the testimony shows the following. Mr. Horsley testified [Rec. p. 91]:

> "*The method employed for developing* negative film *is the same* as that employed for developing positive film, except for the longer period of time required for developing the negative. So far as the *operation* of the machines is concerned *they are identical.*" (Italics ours.)

On recross-examination [Rec. p. 94], Mr. Horsley testified that the machine, without the additional tank, "can

develop negative film." Mr. Seid, on examination by plaintiffs' counsel, explains how negative film could be run on the machine without the additional developing tank, at page 99 of the record as follows:

> "Assuming we attempted to develop picture negative in that positive machine, for one thing, we would have to concentrate our solution, known as the developing solution. We would have to have a stronger developing solution. We would increase the hardening qualities of the hypo and slow down the actual running of the machine. The machine has a speed change on it. We have run the machine as slow as 10½ minutes and we have run it as fast as 2 minutes."

The court's attention is called to the fact that the *original machine had a "speed change" so that the running speed of the machine could be changed* to meet requirements of the film being treated.

With reference to using the machine without the additional tank for developing negative film, Mr. Seid testified [Rec. p. 98] as follows:

> "Basing my answer on my experiences in development of motion picture film, I would say that that machine on the left-hand side of the photograph could be used for developing negative picture film without any change in the construction of it as it stands now."

The only reason the additional tank was used as told by Mr. Seid [Rec. p. 100] was—

> "So we could retain a better rate of speed."

The *function* of the machine as constructed was, by virtue of its film supporting rollers and drive mechanism,

to move film through the tanks. This function is the same with or without the additional tank; the mode of operation is the same and the result, that is, a processed film, is the same.

The kind of film processed does not change the function of the machine, nor does the varying of the speed of travel of the film through the machine change the function of the machine. Consequently, using the additional tank on the machine does not bring to the machine as a whole or in part a new function.

CONCLUSION.

It is our contention:

(a) That the rights of the parties herein are to be determined from the license agreement itself.

(b) That such agreement is not ambiguous as to its terms or meaning.

(c) That the present practice of the present licensor in making separate negative machines and charging higher royalty rate therefor has no bearing on determining the rights of the parties under the license.

(d) That the law of implied license attaching to purchased machines does not apply.

(e) That defendants have not "manufactured" the machine covered by the licensed patents.

(f) That no clause of the license agreement has been violated nor any right of the licensor invaded.

For these reasons, and because we believe the court has been led into error on these points in its decision, we respectfully urge the court to grant a rehearing so that further consideration may be given to these matters.

Respectfully submitted,

COLUMBIA PICTURES CORPORATION,
WILLIAM HORSLEY FILM LABORATORIES, INC.,
Appellees-Petitioners.

By LOYD WRIGHT,
CHARLES E. MILLIKAN,
FRANK L. A. GRAHAM,
Attorneys for Appellees-Petitioners.

I hereby certify that I have examined the foregoing petition, and in my opinion it is well founded; that the case is one in which the prayer of the petitioner should be granted by this court; and that the petition is filed in good faith and not for the purpose of delay.

FRANK L. A. GRAHAM,
Of Counsel for Plaintiff-Appellee.

No. 6855

United States
Circuit Court of Appeals
For the Ninth Circuit

LUTHER WEEDIN, United States Commissioner of Immigration at the Port of Seattle, Washington,

Appellant,

vs.

UNG SUE CHU,

Appellee.

Transcript of Record

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

9/20/32

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF COUNSEL.

MESSRS. ANTHONY SAVAGE and HAMLET P. DODD, Attorneys for Appellant,
307 Federal Building, Seattle Washington.

MR. FRED H. LYSONS, Attorney for Appellee,
1400 Alaska Building, Seattle, Washington. [1]*

In the United States District Court, for the Western District of Washington, Northern Division.

No. 20,630

In the Matter of the Application of
UNG BING QUONG
for a Writ of Habeas Corpus on behalf of
UNG SUE CHU.

PETITION FOR WRIT OF HABEAS CORPUS.

To the Honorable Judge of the above Court:

Comes now your petitioner, Ung Bing Quong as the father and next friend of Ung Sue Chue, and respectively represents and shows:

I.

That said Ung Sue Chu, born in China, arrived in the United States at the Port of Seattle, on the Steamship "President Cleveland," on or about September 22, 1931, from China, and then and there made application to the Commissioner of Immigration at said Port for admission to the United States

*Page numbering appearing at the foot of page of original certified Transcript of Record.

as the minor son of your petitioner Ung Bing Quong, a domiciled Chinese merchant.

II.

That in accordance with law and the rules and regulations governing the admission of Chinese to the United States, there was then and there assembled and organized a board of special inquiry to inquire into the right of said Ung Sue Chu of admission to the United States, and upon his hearing for admission under his said application, and full and complete investigation thereunder, said board made its finding and decision that the said Ung Sue Chu was a minor under the age of twenty-one years and was the son of your petitioner Ung Bing Quong, who for more than one year prior thereto had been and then was a domiciled Chinese merchant with an established place of business at No. 515 Eighth Avenue South, Seattle, Washington, which said findings and decision were then and there in all things approved by the Honorable Commissioner of Immigration at said Port.

III.

That notwithstanding said finding and decision said board of special inquiry and said Commissioner denied admission to the United States of said Ung Sue Chu under the pretext and alleged ground that his said application for admission, presented by him upon his arrival, was without vise, or endorsement or approval of the United States Consul at

Shanghai, from which port said Ung Sue Chu had embarked on said Steamship destined to the Port of Seattle, as aforesaid, and [2] said Commissioner thereupon ordered and directed his deportation to China.

IV.

That said Ung Sue Chu duly appealed to the Honorable Secretary of Labor from said decision and order, and on or about January 11, 1932, said appeal was by the said Secretary of Labor dismissed and said order of deportation affirmed.

V.

That notwithstanding the right of admission to the United States of the said Ung Sue Chu under the facts as above set forth, he is now detained, imprisoned, confined and restrained of his liberty by the Honorable Luther Weedin as United States Commissioner at and for the Port of Seattle at and in the immigration station in the City of Seattle, County of King, State of Washington, in the district aforesaid, and within the jurisdiction of this court, said detention, imprisonment, confinement and restraint being for the pretended and purported reason that said Ung Sue Chun was not entitled to admission to the United States without the Consular vise, endorsal or approval, as aforesaid.

VI.

That said detention, imprisonment, confinement and constraint is not upon or under any process

issued by any final judgment of a court of competent jurisdiction, nor for contempt of any court officer of body having authority in the premises to commit, nor upon a warrant issued from this court or any other court upon any indictment or information.

WHEREFORE your petitioner prays that an order be issued herein directing the said Honorable Luther Weedin as Commissioner of Immigration, as aforesaid, ordering and commanding him to appear and show cause in this court at a time to be fixed in said order, why a writ of habeas corpus should not issue herein, and to do and receive what shall then and there be considered concerning the said Ung Sue Chu, and that upon the hearing upon said order to show cause a writ of habeas corpus may issue, directed to the said Honorable Luther Weedin, as aforesaid, commanding him to have the body of said Ung Sue Chu before the Honorable Judge of this court at the Federal Building in the City of Seattle, at such time as in the said order may be fixed, to do and receive what shall then and there be considered concerning said Ung Sue Chu, together with the statement and time and cause of his said detention.

FRED H. LYSONS,
Attorney for your Petitioner. [3]

State of Washington,
County of King.—ss.

Ung Bing Quong, being first duly sworn on oath deposes and says: That he is the above-named peti-

tioner; that he has read the foregoing petition, knows the contents thereof and believes the same to be true and correct.

UNG BING QUONG.

Subscribed and sworn to before me this 20 day of January, 1932.

[Seal] FRED H. LYSONS,
Notary Public in and for State of Washington, residing at Seattle.

[Endorsed]: Filed Jan. 21, 1932. Ed. M. Lakin, Clerk. [4]

[Title of Court and Cause.]

ORDER TO SHOW CAUSE.

Upon reading and filing the petition of Ung Bing Quong on behalf of Ung Sue Chu, wherein it is made to appear that said Ung Sue Chu is wrongfully and illegally confined and restrained of his liberty by the Hon. Luther Weedin as Commissioner of Immigration at the United States Immigration Station at Seattle, Washington, and stating wherein said illegality consists; now, therefore, it is by the Court

ORDERED that the said Hon. Luther Weedin as Commissioner of Immigration, as aforesaid, show cause before this court on the 1st day of February, 1932, at ten o'clock A. M., or as soon thereafter as said petition may be heard, why a writ of habeas corpus should not issue herein, and why said Ung

Sue Chu should be further restrained of his liberty; and it is further

ORDERED that the petitioner forthwith deposit with the said Commissioner of Immigration at Seattle, Washington, the sum of $100.00 as board and maintenance charges of the said Ung Sue Chu pending further hearing.

DONE IN OPEN COURT this 21 day of January, 1932.

JEREMIAH NETERER,
Judge.

[Endorsed]: Filed Jan. 21, 1932. Ed. M. Lakin, Clerk. [5]

[Title of Court and Cause.]

RETURN TO ORDER TO SHOW CAUSE.

To the Honorable Jeremiah Neterer, Judge of the District Court of the United States for the Western District of Washington:

Comes now the respondent, Luther Weedin, United States Commissioner of Immigration at the port of Seattle, Washington, and, for answer and return to the Order to Show Cause entered herein, certifies and shows to this court that the said Ung Sue Chu, alias Ung Suey Chu, was detained by this respondent at the time he arrived at the port of Seattle, Washington, to wit: September 22, 1931, as an alien Chinese person not entitled to admission into the United States under the laws of the United

States, pending a decision on his application for admission as a minor son of a lawfully domiciled Chinese merchant; that, after a hearing before a legally constituted Board of Special Inquiry at the Seattle, Washington, Immigration Station, the application of the said Ung Sue Chu, alias Ung Suey Chu, for admission into the United States was denied by the said Board of Special Inquiry for the reason that he had not presented to the said Board of Special Inquiry a passport, or any official document in the nature of a passport, visaed or authenticated by an American consular officer, or a visaed affidavit prepared on application form of the State Department for non-immigrant visas, or any consular visa of any description, as required by (1) Rule 2, Par. 2-A of the rules governing the admission of Chinese issued by the Secretary of Labor October 1, 1926; (2) Rule 3, Subdivision F, Par. 2, of the Immigration Rules issued by the Secretary of Labor January 1, 1930; (3) Paragraph II of the President's Proclamation of February 21, 1928, designated as Executive Order No. 4813; that the said Ung Sue Chu, alias Ung Suey Chu, appealed from the decision of the Board of Special Inquiry to the Secretary of Labor; that his appeal was dismissed by the Secretary of Labor and his return to China directed; [6] that, since the final decision of the Secretary of Labor, this respondent has held, and now holds and detains, the said Ung Sue Chu, alias Ung Suey Chu, for deportation to China as an alien Chinese person not entitled to admission into the

United States under the laws of the United States, and subject to deportation to China under the laws of the United States.

The original record of the Department of Labor, and all exhibits, both on the hearing before the Board of Special Inquiry at the Seattle, Washington, Immigration Station, and on the submission of the record on the appeal to the Secretary of Labor, in the matter of the application of Ung Suey Chu for admission into the United States, are attached hereto and made a part and parcel of this Return as fully and completely as though set forth herein in detail.

WHEREFORE, respondent prays that the petition for a Writ of Habeas Corpus be denied.

LUTHER WEEDIN.

United States of America,
Western District of Washington,
Northern Division.—ss.

Luther Weedin, being first duly sworn, on oath deposes and says: That he is United States Commissioner of Immigration at the port of Seattle, Washington, and the respondent named in the foregoing Return; that he has read the foregoing Return, knows the contents thereof and believes the same to be true.

LUTHER WEEDIN.

Subscribed and sworn to before me this 28th day of January, 1932.

[Notary's Seal] D. L. YOUNG,
Notary Public in and for the State of Washington, residing at Seattle, Washington.

[Endorsed]: Filed Feb. 5, 1932. Ed. M. Lakin, Clerk. [7]

[Title of Court and Cause.]

DECISION GRANTING WRIT.

FRED H. LYSON, Esq., For Petitioner.
ANTHONY SAVAGE, U. S. Atty.,
HAMLET P. DODD, Asst. U. S. Atty.,
For United States.

NETERER, District Judge:

The writ in this case must issue. The congested condition of business precludes my preparing a formal opinion, but suffice it to say that the petitioner is within the treaty stipulations. In re Gue Lim, 176 U. S. 459; In re Cheung Sum Shee, 268 U. S. 336. And the treaty stipulations may not be avoided or set aside by Presidential proclamation or promulgation of any rule by the Department, but only by expressed act of the Congress, clearly manifesting such intent. There is nothing in the record which brings this case within the exception. The writ is granted.

NETERER,
United States District Judge.

[Endorsed]: Filed Feb. 15, 1932. Ed. M. Lakin, Clerk. [8]

[Title of Court and Cause.]

ORDER GRANTING WRIT OF HABEAS CORPUS.

This matter coming duly and regularly on for hearing on the petition of Ung Bing Quong for a writ of habeas corpus on behalf of Ung Sue Chu, the petitioner appearing by his attorney, Fred H. Lysons, and respondent appearing by Hamlet P. Dodd, Assistant United States Attorney; and the court having theretofore issued its order to the Hon. Luther Weedin, as United States Commissioner of Immigration at the Port of Seattle, against whom said petition was directed, to show cause why said petition should not be granted; and it appearing to the court after due consideration that no sufficient cause has been shown for or on behalf of said Commissioner of Immigration, and it satisfactorily appearing to the court that said writ should issue as prayed for in the petition, it is now by the court

ORDERED that a Writ of Habeas Corpus issue herein out of and under the seal of this court, directed to said respondent, Hon. Luther Weedin, Commissioner of Immigration, as aforesaid, commanding him to have the body of the said Ung Sue Chu before this court on the 19th day of February, 1932, at the hour of 2 o'clock P. M., then and there

to do and receive what shall be considered concerning said Ung Sue Chu.

Done in open court this 18 day of February, 1932.

JEREMIAH NETERER,
Judge.

O. K. as to form.
Hamlet P. Dodd,
Assistant United States Attorney.

[Endorsed]: Filed Feb. 18, 1932, Ed. M. Lakin, Clerk. [9]

[Title of Court and Cause.]

WRIT OF HABEAS CORPUS.

The President of the United States of America:
To Luther Weedin, Commissioner of Immigration, Seattle, Washington.

GREETING:

WE COMMAND YOU, that you have the body of Ung Sue Chu by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention by whatsoever name said Ung Sue Chu shall be called or charged, before the Hon. Jeremiah Neterer, United States District Judge for the Western District of Washington, at Seattle, Washington, in the City of Seattle, in the Northern Division of said Western District of Washington, on the 19th day of February, A. D. 1932, at 2 o'clock in the afternoon,

to do and receive what shall then and there be considered concerning the said Ung Sue Chu. And have you then and there this writ.

WITNESS the Hon. Jeremiah Neterer, Judge of the United States District Court for the Western District of Washington this 18th day of February in the year of our Lord one thousand nine hundred and thirty-two.

[Seal] ED. M. LAKIN, Clerk,
By S. Cook, Deputy Clerk.

FRED LYSONS,
Attorney for Petitioner. [10]

RETURN ON SERVICE OF WRIT.

United States of America,
Western District of Washington.—ss.

I hereby certify and return that I served the annexed writ of habeas corpus on the therein-named Luther Weedin, by handing to and leaving a true and correct copy thereof with J. P. Dunton, Chief Inspector Immigration Dept., personally at Seattle, in said District on the 19th day of Feb. A. D. 1932.

CHAS. E. ALLEN,
U. S. Marshal.
By J. M. Green,
Deputy.

Fees and Expn. $2.20. [11]

[Title of Court and Cause.]

RETURN TO WRIT.

To the HONORABLE JEREMIAH NETERER,
Judge of the district Court of the United States
for the Western District of Washington:

Comes now Luther Weedin, United States Commissioner of Immigation at the port of Seattle, Washington, and, for return to the writ of habeas corpus heretofore served upon him, herewith produces in court the body of Ung Sue Chu, and shows and certifies to this court that the statements of facts in the return to the order to show cause, heretofore filed herein, are true and correct, and by reference thereto same are made a part of this return, as fully and completely as though set forth herein in detail.

WHEREFORE, having made a full and complete return and certificate as to the manner and authority by which the said Ung Sue Chu is held, Luther Weedin, United States Commissioner of Immigration, who makes this return prays this court for an order quashing the writ of habeas corpus heretofore entered.

LUTHER WEEDIN,
United States Commissioner of Immigration.

United States of America,
Western District of Washington,
Northern Division.—ss.

Luther Weedin, being first duly sworn, on oath deposes and says: That he is United States Commissioner of Immigration at the port of Seattle, Washington; that he has read the foregoing return, knows the contents thereof and believes the same to be true.

LUTHER WEEDIN.

Subscribed and sworn to before me this 19th day of February, 1932.

[Notary's Seal] D. L. YOUNG,
Notary Public in and for the State of Washington, residing at Seattle, Washington.

[Endorsed]: Filed Feb. 19, 1932. Ed. M. Lakin, Clerk. [12]

In the United States District Court for the Western District of Washington, Northern Division.

No. 20,630.

In the Matter of the Application of

UNG BING QUONG,

for a Writ of Habeas Corpus on behalf of UNG SUE CHU.

JUDGMENT AND ORDER.

This matter coming on regularly for hearing upon the Writ of Habeas Corpus heretofore issued

herein, commanding the respondent, Hon. Luther Weedin, as United States Commissioner of Immigration at the Port of Seattle, Washington, to have the body of Ung Sue Chu before this court on the 19th day of February, 1932, at 2 o'clock P. M. of said day, then and there to do and receive what shall then and there be considered concerning the said Ung Sue Chu, said petitioner appearing by Fred H. Lysons, his attorney, and said respondent appearing by Hamlet P. Dodd, Assistant United States Attorney; and the court upon the hearing of the show cause order theretofore issued herein, having by its decision found and determined that the said Ung Sue Chu was lawfully entitled to enter the United States, and that the respondent was without lawful right or authority to deny him the right to so enter, and ordering that a Writ of Habeas Corpus issue as prayed for by petitioner on behalf of said Ung Sue Chu, and now on motion of counsel for petitioner and no good and sufficient cause to the contrary appearing, and the law and the premises being by the court duly considered, it is now by the court

ORDERED AND ADJUDGED:

1. That said Ung Sue Chu is illegally restrained and deprived of his liberty at the Immigration station of Seattle, Washington, by Hon. Luther Weedin as United States Commissioner of Immigration, at said port.

2. That said respondent be and he is hereby ordered and directed to release and discharge the

said Ung Sue Chu from custody and restore him to his liberty upon his filing with the Clerk of this Court a good and sufficient undertaking in the penal sum of $1000.00, to be approved by the court, conditioned that in the event an appeal be taken from this order and judgment by respondent to the United States Circuit Court of Appeals for the Ninth Circuit, he will at all times during the pendency of said appeal render himself amenable to the orders of this court and of said court of appeals, and will abide all orders and judgments made or rendered upon said appeal. [13]

Done in open court this 19th day of February, 1932.

JEREMIAH NETERER.

O. K. as to form.

Hamlet P. Dodd,

Assistant United States Attorney.

[Endorsed]: Filed Feb. 19, 1932. Ed. M. Lakin, Clerk. [14]

[Title of Court and Cause.]

NOTICE OF APPEAL.

To Ung Bing Quong, and to Fred H. Lysons, Esq., his attorney:

You, and each of you, are hereby notified that Luther Weedin, as United States Commissioner of Immigration at the Port of Seattle, Washington, the respondent in the above-entitled cause, hereby

and now appeals from that certain Judgment and Order made herein by the above-entitled court on the 19th day of February, 1932, ordering and adjudging that the above-named Ung Sue Chu be discharged from the custody of the said United States Commissioner of Immigration, and from the whole thereof, to the United States Circuit Court of Appeals for the Ninth Circuit.

ANTHONY SAVAGE,
United States Attorney.
TOM DeWOLFE,
Assistant United States Attorney,
Attorneys for Respondent.

Received a copy of the within notice this 9th day of May, 1932.

Fred H. Lysons,
Attorney for Ung Bing Quong.

[Endorsed]: Filed May 9, 1932. Ed. M. Lakin, Clerk. [15]

[Title of Court and Cause.]

PETITION FOR APPEAL.

Luther Weedin, United States Commissioner of Immigration at the Port of Seattle, Washington, the respondent in the above-entitled cause, deeming himself aggrieved by the Judgment and Order entered herein on the 19th day of February, 1932, does hereby appeal from the said Judgment and Order to the United States Circuit Court of Appeals for the Ninth Circuit, and prays that a tran-

script and record of the proceedings and papers upon which the said Judgment and Order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial District of the United States.

ANTHONY SAVAGE,
United States Attorney.
TOM DeWOLFE,
Assistant United States Attorney,
Attorneys for Respondent.

Received a copy of the within Petition this 9th day of May, 1932.

Fred H. Lysons,
Attorney for Petitioner.

[Endorsed]: Filed May 9, 1932. Ed. M. Lakin, Clerk. [16]

[Title of Court and Cause.]

ASSIGNMENTS OF ERROR.

I.

The Court erred in holding and deciding that a Writ of Habeas Corpus be awarded to the above-named Ung Sue Chu.

II.

The Court erred in ordering and adjudging that the above-named Ung Sue Chu be discharged from the custody of Luther Weedin, as United States Commissioner of Immigration at the Port of Seattle, Washington.

III.

The Court erred in holding and adjudging that the above-named Ung Sue Chu was not subject to exclusion and deportation, but was entitled to come into, and remain in, the United States.

ANTHONY SAVAGE,
United States Attorney.
TOM DeWOLFE,
Assistant United States Attorney,
Attorneys for Respondent.

Received a copy of the within Assignment of Errors this 9th day of May, 1932.

Fred H. Lysons,
Attorney for Ung Bing Quong.

[Endorsed]: Filed May 9, 1932. Ed. M. Lakin, Clerk. [17]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

Now, to-wit, on this 9th day of May, 1932, it is hereby ORDERED that the appeal be allowed as prayed for.

Done in open Court this 9th day of May, 1932.

JEREMIAH NETERER,
United States District Judge.

Received a copy of the within Order this 9th day of May, 1932.

Fred H. Lysons,
Attorney for Petitioner.

[Endorsed]: Filed May 9, 1932. Ed. M. Lakin, Clerk. [18]

[Title of Court and Cause.]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That we, Ung Bing Quong and Ung Sue Chu, as principals, and United States Fidelity and Guaranty Co., as surety, hereby acknowledge ourselves, jointly and severally bound unto the United States of America in the penal sum of One Thousand Dollars ($1000.00), lawful money of the United States, for the payment of which well and truly to be made we bind ourselves, and each of us, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Dated at Seattle, Washington, this 19th day of February, 1932.

The condition of the above obligation is such, that

WHEREAS, in a proceeding pending in the District Court of the United States for the Western District, Northern Division, entitled as above, such proceedings were had that on the 20th day of February, 1932, an order and judgment was duly made and entered therein that the above bounden Ung Sue Chu was illegally restrained of his liberty by Luther Weedin as United States Commissioner of Immigration at Seattle, Washington, and ordering

and directing the said Luther Weedin to release the said Ung Sue Chu from custody and restore him to liberty upon his filing with the clerk of said court a good and sufficient undertaking in the sum of One Thousand Dollars, conditioned that in the event an appeal was prosecuted by said Weedin from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit, he would render himself amenable to and would abide all orders and judgments of said Circuit Court of Appeals and of said District Court.

NOW, THEREFORE, in the event of said appeal being prosecuted, and the said Ung Sue Chu well and truly rendering himself amenable to, and abide all orders and judgments of said Circuit Court of Appeals, and of said District Court, then this obligation to be null and void and of no effect, otherwise to remain in full force and virtue.

UNG BING QUONG
(Signature in Chinese),
Principals.

Witnesses:
FRED H. LYSONS,
LOOK HAM.

[Seal] UNITED STATES FIDELITY AND GUARANTY COMPANY.
C. H. CAMPBELL,
Attorney-in-fact,
Surety.

O. K.
HAMLET P. DODD,
Assistant United States District Attorney.

Approved, this 19th day of February, 1932.

JEREMIAH NETERER,
Judge.

[Endorsed]: Filed Feb. 19, 1932. Ed. M. Lakin, Clerk. [19]

[Title of Court and Cause.]

STIPULATION FOR TRANSMISSION OF ORIGINAL RECORD.

It is hereby stipulated by and between counsel for the petitioner and for the United States Commissioner of Immigration that the certified immigration file and the other records of the Department of Labor, covering the exclusion and deportation proceedings against UNG SUE CHU, which were filed with the Return of the United States Commissioner of Immigration to the Order to Show Cause, may be transmitted with the appellate record in this cause, and may be considered by the United States Circuit Court of Appeals in lieu of a certified copy of the said immigration file and records of the Department of Labor.

FRED H. LYSONS,
Attorney for Petitioner.
ANTHONY SAVAGE,
United States Attorney,
HAMLET P. DODD,
Assistant United States Attorney,
Attorneys for the United States
Commissioner of Immigration.

Received a copy of the within Stipulation this 12th day of May, 1932.

FRED H. LYSONS,
Attorney for Petitioner.

[Endorsed]: Filed May 16, 1932. Ed. M. Lakin, Clerk. [20].

[Title of Court and Cause.]

ORDER FOR TRANSMISSION OF ORIGINAL RECORD.

Upon stipulation of counsel, it is by the Court ORDERED, and THE COURT DOES HEREBY ORDER, that the Clerk of the above-entitled court transmit with the appellate record in said cause the original file and records of the Department of Labor covering the exclusion and deportation proceedings against Ung Sue Chu, which were filed with the Return of the United States Commissioner of Immigration to the Order to Show Cause, directly to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, in order that the said original file and records may be considered by the said Circuit Court of Appeals in lieu of a certified copy of same.

Done in open court this 16th day of May, 1932.

EDWARD E. CUSHMAN,
United States District Judge.

Received a copy of the within Order this 12th day of May, 1932.

FRED H. LYSONS,
Attorney for Petitioner.

[Endorsed]: Filed May 16, 1932. Ed. M. Lakin, Clerk. [21]

[Title of Court and Cause.]

PRAECIPE FOR APPELLANT FOR TRANSCRIPT OF RECORD ON APPEAL.

To the Clerk of the above-entitled court:

You will please prepare and duly authenticate the transcript and following portions of the record in the above-entitled cause for appeal of the appellant, heretofore allowed, to the United States Circuit Court of Appeals for the Ninth Circuit:

1. Petition for Writ of Habeas Corpus.
2. Order to Show Cause.
3. Return to Order to Show Cause.
4. Memorandum Decision Filed February 15, 1932.
5. Order Granting Writ of Habeas Corpus.
6. Writ of Habeas Corpus.
7. Return to Writ of Habeas Corpus.
8. Judgment and Order Discharging the Petitioner.
9. Bond.
10. Petition for Appeal.
11. Order Allowing Appeal.

12. Notice of Appeal.
13. Assignments of Error.
14. Citation.
15. Stipulation for Transmission of Original Record.
16. Order for Transmission of Original Record.
17. This Praecipe.

ANTHONY SAVAGE,
United States Attorney,
HAMLET P. DODD,
Assistant United States Attorney,
Attorneys for Appellant.

Received a copy of the within Praecipe this 12th day of May, 1932.

FRED H. LYSONS,
Attorney for Petitioner.

[Endorsed]: Filed May 16, 1932. Ed. M. Lakin, Clerk. [22]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington.—ss.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 22,

inclusive, to be a full, true, correct and complete copy (except for omissions of title of court and cause) of so much of the record, papers and other proceedings in the above entitled cause as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle, and that the same constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

[23]

Clerk's fees (Act Feb. 11, 1925) for making record, certificate or return, 49 folios at 15¢	$ 7.35
Appeal fee (Section 5 of Act)	5.00
Certificate of Clerk to Transcript of Record	.50
Certificate of Clerk to Original Exhibits	.50
	$13.35

I hereby certify that the above cost for preparing and certifying record, amounting to $13.35 has not been paid to me for the reason that said appeal is being prosecuted by the United States Government.

I further certify that I attach hereto and transmit herewith the original citation on appeal issued in this cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 23d day of May, 1932.

ED. M. LAKIN,
Clerk of the United States District Court for the Western District of Washington,
By T. W. EGGER,
Deputy. [24]

[Title of Court and Cause.]

CITATION ON APPEAL.

The United States of America.—ss.
To Ung Sue Chu, Greeting:

WHEREAS, Luther Weedin, United States Commissioner of Immigration at the port of Seattle, Washington, has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the Judgment and Order lately, to wit: on the 19th day of February, 1932, made in the District Court of the United States for the Western District of Washington, Northern Division, in favor of you, ordering, adjudging and decreeing that Ung Sue Chu be released from the custody of the said Luther Weedin, as such United States Commissioner of Immigration, and setting him at large.

YOU ARE THEREFORE CITED TO APPEAR before the United States Circuit Court of Appeals in the city of San Francisco, State of California, on the 8th day of June next, to do and receive what may obtain to justice to be done in the premises.

GIVEN UNDER MY HAND in the city of Seattle, Washington, in the Ninth Circuit, this 9th day of May, in the year of our Lord nineteen hundred and thirty-two, and the Independence of the United States the one hundred and fifty-seventh.

[Seal] JEREMIAH NETERER,
Judge of the United States District Court for the Western District of Washington.

Received a copy of the within Citation this 9th day of May, 1932.

FRED H. LYSONS,
Attorney for Ung Bing Quong Chu.

[Endorsed]: Filed May 9, 1932. Ed. M. Lakin, Clerk. [25]

[Endorsed]: No. 6855. United States Circuit Court of Appeals for the Ninth Circuit. Luther Weedin, United States Commissioner of Immigration at the Port of Seattle, Washington, Appellant, vs. Ung Sue Chu, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed May 26, 1932.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the
United States Circuit Court of Appeals
For the Ninth Circuit

No. 6855

LUTHER WEEDIN, as United States Comissioner of Immigration at the Port of Seattle, Washington,

Appellant,

vs.

UNG SUE CHU,

Appellee.

Upon appeal from the District Court of the United States for the Western District of Washington, Northern Division.
Honorable Jeremiah Neterer, Judge.

BRIEF OF APPELLANT

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JOHN F. DUNTON,
United States Immigration Service,
Seattle, Washington,

On the Brief.

MERCANTILE PTG. & ADV. CO.

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CASES CITED

In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 6855

LUTHER WEEDIN, as United States Comissioner of Immigration at the Port of Seattle, Washington,

Appellant,

vs.

UNG SUE CHU,

Appellee.

Upon appeal from the District Court of the United States for the Western District of Washington, Northern Division. Honorable Jeremiah Neterer, Judge.

BRIEF OF APPELLANT

STATEMENT OF THE CASE.

The appellee, UNG SUE CHU, alias UNG SUEY CHU, is of the Chinese race and claims to have been born in China on a Chinese date equivalent to November 2, 1910. He never resided in the United States. He came from China on the steamer

"President Cleveland," arriving at the Port of Seattle, Washington, September 22, 1931, and applied for admission into the United States as a minor son of UNG BING QUONG, a lawfully domiciled Chinese merchant. He was accorded hearings before a Board of Special Inquiry at the Seattle, Washington, Immigration Station, and his application for admission was denied by the said Board of Special Inquiry. Thereafter he appealed from the said decision to the Secretary of Labor, his appeal was dismissed by the Secretary of Labor and his return to China was directed. Thereafter a petition for a Writ of Habeas Corpus was filed in the District Court of the United States for the Western District of Washington, Northern Division. After a hearing on an Order to Show Cause why a Write of Habeas Corpus should not issue, such writ was granted by the Honorable Jeremiah Neterer, District Judge, and subsequently a Judgment and Order discharging the said UNG SUE CHU was entered. The United States Commissioner of Immigration duly filed his notice of appeal and proceedings to perfect said appeal were duly instituted.

ASSIGNMENTS OF ERROR

"I. The Court erred in holding and deciding that a Writ of Habeas Corpus be awarded to the

above-named UNG SUE CHU."

"II. The Court erred in ordering and adjudging that the above-named UNG SUE CHU be discharged from the custody of LUTHER WEEDIN, as United States Commissioner of Immigration at the Port of Seattle, Washington."

"III. The Court erred in holding and adjudging that the above-named UNG SUE CHU was not subject to exclusion and deportation, but was entitled to come into, and remain in, the United States."

ARGUMENT

The mercantile status of the alleged father, UNG BING QUON (or QUON), the claimed relationship, and the claimed minority of UNG SUE CHU were conceded by the immigration officials. The application for admission was denied for the reason that the said UNG SUE CHU had not presented to the Board of Special Inquiry a passport, or any official document in the nature of a passport, visaed or authenticated by an American consular officer, or a visaed affidavit prepared on application form of the State Department for non-immigrant visas, or any consular visa of any discription, as required by (1)

Rule 2, Par. 2-A of the rules governing the admission of Chinese issued by the Secretary of Labor October 1, 1926; (2) Rule 3, Subdivision F. Par. 2, of the Immigration Rules issued by the Secretary of Labor January 1, 1930; (3) Paragraph II of the President's Proclamation of February 21, 1928, designated as Executive Order No. 4813.

On the appeal to the Secretary of Labor and before the District Court counsel contended that, as a matter of law, wives and minor children of Chinese merchants are not required to present any of the papers prescribed in the rules and proclamation cited above, and that their right to admission into this country is guaranteed by the Treaty with China, without presentation of any such papers. In support of his contention he cited the cases of *Mrs. Gue Lim* (176) U. S. 459) *and Cheung Sum Shee et al.* (268 U. S. 336, 45 S. Ct. 539).

The decision in the case of *Mrs. Gue Lim* has no application to the present case, inasmuch as it was made in 1899 and the sole question before the court was whether or not the wives and minor children of merchants were required to present the certificate prescribed for merchants by Section 6 of the Act of 1882-1884 (22 Stat. L. 58; 23 Stat. L. 115), *in order to be admissible.*

From the enactment of the Act of May 26, 1924 (43 Stat. 153), until the decision in the *Cheung Sum Shee case* May 25, 1925, it was held by the Departments of State and Labor that the wives and minor children of Chinese merchants were *mandatorily excluded* by Sections 5 and 13 (c) of said Act. Consequently, as a matter of course, no regulations were made as to the presentation of any papers by such persons, and the opinion of the Supreme Court in said case shows that no such issue was before the said Court, the sole question certified being: "Are the alien Chinese wives and minor children of Chinese merchants who were lawfully domiciled within the United States prior to July 1, 1924, such wives and minor children now applying for admission, mandatorily excluded from the United States under the provisions of the Immigration Act of 1924?" (*Said Act contains nothing as to what papers are to be presented by persons having a non-immigrant status.*)

Section 24 of the Immigration Act of 1924 (8 U. S. C. A., Sec. 222) provides:

"The Commissioner General with the approval of the Secretary of Labor, shall prescribe rules and regulations for the enforcement of the provisions of this act; but all such rules and regulations, in so far as they relate to the administration of this act by consular officers, shall be prescribed by the Secretary of

State on the recommendation of the Secretary of Labor."

Department of Labor Circular 55266/General of July 1, 1924, reads as follows:

"CHINESE RULES AND REGULATIONS UNDER THE IMMIGRATION ACT OF 1924.

"The following regulations are issued for the guidance of field officers in enforcing the provision of the Act of Congress entitled 'Immigration Act of 1924' in so far as it relates to persons of the Chinese race."

* * * * * * * * * *

"Merchants now in the United States, as well as those merchants who arrive after July 1, 1924, cannot have their wives and alien children admitted to them, unless such relatives are admissible by virtue of their own status. This is made necessary because of the express inhibition against their coming to the United States as found in Paragraph (c) of Section 13 and that portion of Section 5 which reads as follows: 'An alien who is not particularly specified in this Act as a non-quota immigrant or a non-immigrant shall not be admitted as a non-quota immigrant or a non-immigrant by reason of relationship to any individual who is so specified or by reason of being excepted from the operation of any other law regulating or forbidding immigration."

Department of Labor Circular No. 55266/General, dated August 7, 1924, issued in explanation of De-

partment of Labor Chinese General Order No. 4 of the same date, reads the same as the foregoing ,with the exception that the words "which tells what classes of persons ineligible to citizenship may be admitted" are inserted after "Section 13."

August 14, 1925, after the decision of the Supreme Court in the *Cheung Sum Shee* case, the Second Amendment to Chinese General Order No. 4 was issued by the Secretary of Labor, reading as follows:

"Subject: WIVES AND MINOR CHILDREN OF CHINESE MERCHANTS RESIDENT IN THE UNITED STATES OR ENTITLED TO ENTER UNDER SECTION 3 (SIX) OF THE IMMIGRATION ACT OF 1924."

"In view of the recent Supreme Court decision relative to the right of admission of the above-named class of Chinese aliens, the Department of State, with the approval of the Department of Labor, has furnished its consular officers in China with the following instructions, which should be adhered to by the officers of this Service in handling the classes of aliens therein mentioned:

'In view of recent Supreme Court decision it is deemed that wives and minor children of Chinese merchants resident in United States or entitled to enter under Section three (six) of Immigration Act of 1924, are themselves entitled to enter in same class. Grant

visas accordingly. Such Chinese wives and minor children must use visaed affidavits instead of passports or Section six certificates. Minor children under sixteen may be included in mother's affidavit. Chinese wives and minor children entering under Section three (two) must have separate Section six certificates as heretofore. Chinese wives of American citizens are not admissible under Section four (a). Repeat to all consular officers in China.'

"Chinese General Order No. 4 dated August 7, 1924, and letter in explanation thereof of the same date are amended accordingly."

Rule 2, Par. 2, Sec. 2-A of the Department of Labor Rules of October 1, 1926, governing the admission of Chinese, reads as folows:

"Chinese merchants coming solely to carry on trade under and in pursuance of treaties of commerce and navigation are required to present Section 6 certificates, together with non-immigrant Section 3 (6) visas. If their alien wives and minor children accompany the husband and father they must present upon arrival at the port an affidavit, which need not be visaed, but must be prepared upon the application form of the State Department for non-immigrant visa. If such alien wives and minor children do not accompany the husband and father they must present upon arrival at the port a duly visaed affidavit, prepared under the State Department form mentioned in the preceding sentence. Children under 16 years of age, if accom-

panied by the mother, may be included in her affidavit. The lawful alien wives and minor children of Chinese merchants lawfully resident in the United States prior to July 1, 1924, should present upon arrival the same documents *described in the preceding paragraph*, depending upon whether they accompany the husband and father on his return from a visit abroad or are coming to the United States to join him. * *"

Chinese General Order No. 17, issued by the Secretary of Labor June 27, 1930, Par. 2, Sec. 2-A, reads the same as the foregoing with the exception that the words "*described above*" are substituted for the words "*described in the preceding paragraph.*" This Order is still in force.

Rule 3, Subdivision F, Paragraph 2, of the Immigration Rules issued by the Secretary of Labor January 1, 1930, *still in force*, provides as follows:

"No alien shall be admitted to the United States as a non-immigrant unless such alien shall present to the proper immigration official, at the port of arrival, a passport or official documents in the nature of a passport issued by the government of the country to which he owes allegiance and duly visaed and authenticated by an American consular officer: *Provided.* That non-immigrant citizens of Canada, Newfoundland, Bermuda, the Bahamas, and British possessions in the Greater Antilles or British subjects domociled therein or non-immigrant citizens of St. Pierre, or Miquelon, or French citizens domociled therein, or non-immi-

grant citizens of Panama, Mexico, Cuba, Haiti, or the Dominican Republic, if otherwise admissible, shall be permitted to enter the United States without a passport visa."

The Act of May 22, 1918 (40 Stat. 559, 22 USCA, Secs. 223-226) conferred on the President, when the United States was at war, the duty to prescribe rules and regulations concerning the entry of persons into, and their departure from, the United States. This Act was extended by the Act of March 2, 1921 (41 Stat. 1217, 22 USCA, Sec. 227), which contained a provision "That the provisions of the act approved May 22, 1918, shall, in so far as they relate to requiring passports and visas from aliens seeking to come to the United States, continue in force and effect *until otherwise provided by law.*"

Under authority of these Acts the President issued various Executive Orders, among same being those of January 12, 1925, July 12, 1926, and February 21, 1928, all of which provided as follows with respect to non-immigrant aliens:

"With the exceptions hereinafter specified, they must present passports or official documents in the nature of passports issued by the governments of the countries to which they owe allegiance, duly visaed by consular officers of the United States."

Executive Order 4476 issued July 12, 1926, authorized the Secretary of State and the Secretary of Labor to make such additional rules and regulations, not inconsistent with said Order and the Immigration Act of 1924, and Executive Order 4813, issued February 21, 1928, contained the same authorization. The present petitioner does not come within any of the classes of aliens excepted from the provisions of said Orders.

No. 926 General Instruction Consular (Diplomatic Serial No. 273), Sec. II, Paragraph 23, Page 17, issued by the Department of State March 23, 1929, provides:

"The applications of Chinese for visas should be handled in accordance with the special procedure governing the granting of visas under the Chinese Exclusion laws and the general procedure governing the granting of visas to all aliens. It should be borne in mind that a particular Chinese might be admissible under the Immigration Acts of 1917 and 1924, but he might not be admissable under the Chinese exclusion laws or *vice versa.* (See Art. XXII, Consular Regulations.)"

Article XXII, Consular Regulations, Sec. 372, Note 8, provides:

"* * * As a wife of a merchant admitted prior to July 1, 1924, or of a merchant admitted under Sec-

ion 3 (6) of the Immigration Act of 1924, who desires to join her husband in the United States and to reside therein, has no status upon which a Section Six certificate could properly be issued, (*U. S. v. Mrs. Gue Lim*, 176 U. S. 459), a duplicate Form 257 should be prepared (including her and her accompanying minor children, if any), visaed and furnished to her for presentation at the port of entry. *Such a form should likewise be prepared, visaed, and used in the case of a minor child of this class not accompanied by its parents.*" (*Italics ours*).

Inasmuch as the present appellee did not accompany either of his parents from China, it was necessary, under the provisions of Rule 2, Par. 2, Sec. 2-A, Chinese General Order No. 17, and the above Consular Regulation, that he present on arrival at Seattle a duly visaed affidavit (Form 257) in order to be admissible, if found so in other respects.

Various courts have held that a passport visa is a condition precedent to entry into the United States of a non-immigrant:

U. S. ex. rel. London v. Phelps (CCA), 22 F (2d) 288.

U. S. ex. rel. Graber v. Karnuth (CCA), 30 F (2d) 242.

U. S. ex rel. Komlos v. Trudell (CCA), 35 F (2d) 281.

Goldsmith v. United States (CCA), 42 F (2d) 133.

See also *Koyama v. Burnett*, 8 F (2d) 940. (this court).

If such requirement is not in derogation of the treaty rights of the citizens of 24 other countries with which the United States has treaties of commerce and navigation (which apparently it is not), we are totally unable to see any merit in the contention that the terms of the treaty with China preclude the requirement that the specified papers be presented by non-immigrant citizens of that country, and that the Rules and Regulaions prescribing same, made under the same authority, are null and void.

It appears that the appellee applied for a visa at Hongkong and was refused same by the American Consul General at said port January 22, 1931, for the reason that "Serious doubts exist as to the claimed relationship:" See "Notification of the Refusal of Visa." It also appears that he later went to Shanghi, but did not make any application for a visa to the American Consulate there, and, in some manner, about seven months after he had been refused a visa at Hongkong, boarded the steamer "President Cleveland" on which he arrived at Seattle.

Article XXII, Consular Regulations, Section 372, Note 34, provides:

"The burden of proof is upon an applicant for a visa to show that he is entitled to enter the United States or territory under its jurisdiction.'
and Note 36 provides:

"Since it is the duty of the officer to determine whether the visa should be granted, it is clear that the Department can not precisely prescribe the evidence that must be considered in order properly to handle a particular case. In general,it may be said that, in each case, such an investigation must be made as will enable the principal officer to decide with confidence whether the visa should be granted. The economic nature of legislation affecting Chinese immigration into the United States and territory under its jurisdiction should be constantly kept in the foreground."

No. 926 General Instruction Consular (Diplomatic Seriel No. 273), issued March 23, 1929, provides, page 69, Paragraph 195:

"Doubtful Cases:

"With the responsibility and authority placed upon consular officers by section 2 (f) of the act, there is no longer any reason to grant an immigration visa to an applicant whose admissibility is doubtful simply because he insists upon it. The intent of Congress is clear on the point of reducing to a minumum the number of aliens to be excluded after their arrival in the United States and forced to make the return journey to their homes. Therefore, if the consul has reason to believe that an applicant is not admissible to the Unit-

ed States under the immigration laws, he must discharge the responsibility placed upon him by Congress and refuse to issue the immigration visa."

Letter from American Consul Harold Shantz, at Hongkong, dated October 21, 1930 expressed the opinion that the present appellee did not appear to be a minor, and requested that he be furnished a transcript of the family record of his alleged father, UNG BING QUON. Such record was furnished in letter of December 11, 1930 (p. 7 of the record, and apparently was the basis on which the consul arrived at the conclusion that there was serious doubt as to the claimed relationship (See. p. 40 of the record). It appears from the record that, before final action was taken by the Secretary of Labor affirming the decision of the Board of Special Inquiry, the matter of waiving the visa was taken up with the Department of State, and that the Department of State refused such waiver (See letter from said Department dated December 28, 1931, pp. 42-41 of the record), holding that it did not appear that the Consul General had acted improperly in declining to issue the visa.

In deciding the case of *U. S. ex rel. London v. Phelps* November 1, 1927, the Circuit Court of Appeals for the Second Circuit said:

"* * * It is urged that, even if a visa was lawfully imposed as a condition upon a non-immigrant's entry, the giving of a visa is a ministerial act, which the consul was bound to perform, and consequently the court should regard its omission as immaterial. With this we cannot agree. Certainly the giving of a visa is not merely a ministerial act, because some inquiry on the spot, some determination of fact, is essential. It is to show that he is entitled toenter the United States or admitted that the consul may withhold his visa if he believes the passport not to be genuine, or not in the hands of the rightful holder. The instructions of the Secretary of State which supplement the Executive Order, also require the consul to 'satisfy himself of the temporary nature of the visit' of the alien. Whether the consul has acted reasonably or unreasonably is not for us to determine. Unjustifiable refusal to visa a passport may be ground for diplomatic complaint by the nation whose subject h a s been discriminated against. See Moore's Digest, 996. *It is beyond the jurisdiction of the court.* (Italics ours).

As the relator had no visaed passport, her exclusion was proper, and the order discharging the writ is afirmed."

See also *U. S. ex rel. Graber et al. v. Karnuth* (DC), 29 F (2d) 314, affirmed (CCA 2) 30 F (2d) 242.

In the case of *U. S. ex rel. Ulrich v. Kellogg*, 30 F (2d) 984, the Court of Appeals of the District of Columbia said:

"* * * Under the provisions of sections 2 (a) of the Immigration Act of 1924, supra (8 USCA, Sec. 202 (a), the authority to issue a visa is committed to 'consular' officers. And by Section 2 (f) of the same act it is provided as follows:

'No immigration visa shall be issued to an immigrant if it appears to the consular officer, from statements in the application, or in the papers submitted therewith, that the immigrant is inadmissible to the United States under the immigration laws, nor shall such immigration visa be issued if the application fails to comply with the provisions of this act, nor shall such immigration visa be issued if the consular officer knows or has reason to believe that the immigrant is inadmissible to the United States under the immigration laws.' (8 USCA, Sec. 202 (f).

"We are not able to find any provision of the immigration laws which provides for an official review of the action of the consular officers in such case by a cabinet officer *or other authority.* * * *" Italics ours)

Certiorari was denied in this case (49 S. Ct. 482, 279 U. S. 868, 73 L. Ed. 1005).

CONCLUSION.

The above requirements as to the class of papers which must be secured and presented to the immigration officials by alien Chinese wives and minor children of Chinese merchants were prescribed under law-

ful authority, are not inconsistent with the law, and consequently have the force of law. Such documents have no relation to the certificate specified in Section 6 of the Act of 1882-1884, or to the questions decided by the Supreme Court in the cases of *Mrs. Gue Lim* and *Cheung Sum Shee.* They are simply a substitution for the visaed passport or official document in the nature of a passport exacted of non-immigrants who come from countries which issue such papers to their citizens, and their requirement constitutes no setting aside or invasion of any rights under the treaty with China. The appellee did not present the document required to be presented by a minor child of a Chinese merchant unaccompanied by a parent, and consequently was properly excluded by the immigration authorities. The District Court was in error in granting the Writ of Habeas Corpus and ordering him released from the custody of the Commissioner of Immigration, and its order should be reversed.

Respectfully submitted,

ANTHONY SAVAGE,
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HAMLET P. DODD,
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JOHN F. DUNTON,
United States Immigration
Service,

On the Brief.

No. 6855

UNITED STATES CIRCUIT COURT OF APPEALS

Ninth Circuit

LUTHER WEEDIN, as United States Commissioner of Immigration at the Port of Seattle, Washington, *Appellant*,

—VS.—

UNG SUE CHU, *Appellee.*

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION
HONORABLE JEREMIAH NETERER, *Judge*

BRIEF OF APPELLEE

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THE ARGUS PRESS, SEATTLE

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THE ARGUS PRESS, SEATTLE

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UNITED STATES CIRCUIT COURT OF APPEALS

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UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION
HONORABLE JEREMIAH NETERER, *Judge*

BRIEF OF APPELLEE

STATEMENT OF THE CASE

Appellee Ung Sue Chu, of Chinese birth, minor son of a domiciled Chinese merchant, arriving from China at the Seattle Immigration Port was denied admission by the local authorities and by the Secretary on Appeal, on the sole ground that he was without

> "a passport or any official document in the nature of a passport, visaed or authenticated by an American Consular officer;"

his claimed minority, relationship, and mercantile status of his father being conceded by the Department.

ARGUMENT

The position of the Department that such consular visae or authenticated document is a prerequisite to the admission of the wife or minor son of a domiciled Chinese merchant was negatived as far back as the *Mrs. Gue Lim* case, 176 U. S. 459, decided by the U. S. Supreme Court in 1899, and again by the *Cheung Sum Shee* case, 268 U. S. 336, decided in 1925.

The reluctance with which the judicial interpretation of the treaty involved, recorded in these two decisions, has been accepted by the Department is evidenced by its recurring assaults against this judicial construction, and its persistent efforts by Department rules and regulations to make the treaty mean something different from these court interpretations of it.

Referring to the treaty requirement of such visaed document as to certain classes of Chinese seeking admission, the court in *Mrs. Gue Lim* case, *supra*, says:

> "Does this section mean that in such case the wife must obtain the certificate therein provided for? We think not. * * *
>
> "Various other provisions of this section render it plain to our minds that it was never intended to extend to the wives of persons who were themselves entitled to entry * * *"
>
> "It is plain that in this case the woman could not obtain the certificate as a member of any of those specially enumerated classes. She is neither an official, a teacher, a student, a merchant nor a traveller for curiosity or pleasure. She is simply the wife of a merchant, who is himself a mem-

ber of one of the classes mentioned in the treaty as entitled to admission. And yet it is not possible to presume that the treaty, in omitting to name the wives of those who by the second article were entitled to admission, meant that they should be excluded. If not, then they would be entitled to admission because they were such wives, although not in terms mentioned in the treaty."

"In the case of the minor children, the same result must follow as in that of the wife. All the reasons which favor the construction of the statute as exempting the wife from the necessity of procuring a certificate apply with equal force to the case of minor children of a member or members of the admitted classes. They come in by reason of their relationship to the father, and whether they accompany him or follow him, a certificate is not necessary in either case. When the fact is established to the satisfaction of the authorities that the person claiming to enter, either as wife or minor child, is in fact the wife or minor child of one of the members of the class mentioned in the treaty as entitled to enter, then that person is entitled to enter without a certificate."

The Immigration Act of July, 1924, was construed by the department as excluding these wives and minor children, but its contention was likewise negatived by the Supreme Court in the *Cheung Sum Shee* case, *supra*. The court used this language:

"The wives and children of resident Chinese

merchants were guaranteed the right of entry by the Treaty of 1880, and certainly possessed it prior to July 1st, when the present immigration act became effective. *United States v. Gue Lim, supra.* That act must be construed with the view to preserve treaty rights unless clearly annulled, and we cannot conclude that, considering its history, the general terms therein disclose a Congressional intent absolutely to exclude the petitioners from entry * * *.

"Nor do we think the language of Section 5 is sufficient to defeat the rights which petitioners had under the treaty. In a very definite sense they are specified by the act itself as 'non-immigrants'. They are aliens entitled to enter in pursuance of a treaty as interpreted and applied by this court twenty-five years ago."

Enlightening also, as to the view and position of the executive department of the government on that question, is the memorandum of the then solicitor for the Department of State which is given as an appendix to the Government's brief in the *Cheung Sum Shee* case, commenting on the *Gue Lim* decision as follows:

"The Supreme Court did not inject the wives and children of merchants into the treaty. It found that these persons were already within the treaty. Once the treaty has been authoritatively interpreted—that is, when it is known what the treaty means, what is its scope, what persons are included within its terms—this question is settled. It is no longer pertinent to inquire what reasoning was employed by the Supreme Court in reach-

ing its decision. The element of relationship was, of course, considered by the Supreme Court in deciding what the treaty meant—for what purposes the contracting parties concluded such convention. But relationship was merely an element of interpretation and not a basis of the right * * *. When the question first arose, the meaning of the treaty was not apparent. The Supreme Court interpreted the treaty and found that the contracting parties had given to the wives and children, as well as to the merchants themselves, the right to enter and reside."

The court in that case accordingly directed the admission of these wives and minor children who arrived without

"passports, consular visaes or other documents" of the character mentioned by the department in this case.

The tenacity with which the department hangs to its determination to enforce this visae requirement, regardless of final court decisions to the contrary, is not less remarkable than the ground on which they base their present order of rejection.

That ground is the Presidential Proclamation of February 21, 1928, designated as "Executive Order No. 4813" supplemented by Department Rules of 1926 and 1930.

This Presidential Proclamation presumes to require

"a passport or official document in the nature of a passport issued by the government of the country to which he owes allegiance and duly visaed

and authenticated by an American Consular Officer."

The proclamation also presumes to include in this requirement persons of the class to which this applicant belongs. The proclamation was issued under the Act of Congress of May 22, 1918, which, on inspection, we find to be strictly a war measure with no pretended validity otherwise than "in time of war." The title of the act is:

> "An Act to prevent in time of war departure from and entry into the United States contrary to the public safety;"

the act itself providing that:

> "When the United States is at war, if the President shall find that the public safety required that restrictions and prohibitions in addition to those provided otherwise than by this section, and the three following, be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or Congress, be unlawful—
>
> "(a) For an alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President shall prescribe."

The Congressional Enactment extending this act was included in the act of March 2, 1921, entitled:

> "An Act to make appropriations for the Dip-

lomatic and Consular Service for the fiscal year ending June 30, 1922,"

and was passed while we were still technically at war, as the Peace Resolution ending the war was not passed until later.

The District Court in *United States ex rel. v. Karmuth*, 29 Fed. (2) 314, upholds this reenactment as a

"revenue measure for the purpose of furnishing funds for the maintenance of consular services."

So construed as a "revenue measure", the act itself negatives the department interpretation as inclusive of a requirement for *non-immigration* visaes.

The revenue provisions of the order are these:

"179. The fee for the preparation and acknowledgment of an application for an *immigration* visae is one dollar.

180. The fee for an *immigration* visae is nine dollars.

181. * * * no persons are exempted from the necessity of paying the fee for either *immigration* application or *immigration* visae."

No provision whatever is made in this Presidential Proclamation for fees from non-immigration visaes, and it may therefore be presumed, conclusively we think, that the President had in mind the treaty non-requirement of non-immigration visaes, as pointed out by the Supreme Court in the *Gue Lim* and *Cheung Sum Shee* decisions.

The department, thwarted by the above two decisions in its purpose to base this visae requirement on treaty and statutory authority, is reduced in the present case to (1) the contention that these two de-

cisions are not applicable to the present case; and (2) that the lack of treaty or statutory authority is supplied by the Presidential Proclamation (analyzed above), and by various department "Rules and Regulations", and "General Orders", all of the nature of and including "Chinese General Order No. 17", issued by the Secretary of Labor June 27, 1930.

We deny the validity of this "General Order".

Section 24 of the Act of 1924 gives the right of issuing Rules and Regulations to "The Commissioner General with the approval of the Secretary of Labor;" with the further limitation that

> "all such rules and regulations insofar as they relate to the administration of this act by consular officers shall be prescribed by the Secretary of State on the recommendation of the Secretary of Labor."

Therefore, this "Chinese General Order No. 17", *issued by the Secretary of Labor*, instead of being issued by the *Secretary of State* on the recommendation of the Secretary of Labor, is wholly without controlling force or advisory influence in consular action. Attempted interference with consular duties by the Secretary of Labor, Secretary of Agriculture or any agency other than the State Department, would make for disorder and confusion.

The State Department's "instructions" to the consular service, as set forth on p. 7, Appellant's brief, is in no sense a compliance with Section 24 (Act of 1924) that these consular directions shall be by Rules and Regulations prescribed by the Secretary of State *on the recommendation of the Secretary of Labor.*

These various Proclamations, Regulations and Orders were all effectively disposed of by the District Court in its decision that

> "treaty stipulations may not be avoided or set aside by Presidential Proclamation or promulgation of any rule by the department, but only by expressed Act of Congress, clearly manifesting such intent." (Transcript of Record p. 9)

This decision finds ample support in the authorities. Similar rules and regulations have been held to be in effect, attempts to legislate.

Acting under Section 24 of the Act of 1924, the Commissioner General of Immigration, with the approval of the Secretary of Labor and Secretary of State, issued rules defining "treaty merchants" as those engaged in international trade. In *Kumanomido v. Nagle*, 40 Fed. (2) 42 (this Circuit), the court held that this was a limitation on the statute and invalid.

In *United States v. George*, 228 U. S. 14-21, a case involving the department regulation defining proof to be given in preemption and homestead entry, the court said:

> "It is manifest that the regulation had a requirement which that section (of the law) does not and which is not justified by section 2246, to so construe the latter section is to make it confer unbounded legislative powers. What, indeed, is its limitation? If the Secretary of the Interior may add by regulation one condition, may he not add another?"

In *United States v. United Verde Copper Co.*, 196

U. S. 207, the statute construed authorizes and permits the removal for certain purposes of timber growing upon uplands, etc.—

> "subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and undergrowth upon such lands *and for other purposes.*"

Under this statute the Secretary promulgated this rule:

> "7. No timber is permitted to be used for smelting purposes, smelting being a separate and distinct industry from that of mining."

The court said:

> "The Secretary of the Interior attempts by it to give an authoritative and final construction of the statute. This, we think, is beyond his power. * * *"
>
> "If rule 7 is valid the Secretary of the Interior has power to abridge or enlarge the statute at will. If he can define one term he can another. If he can abridge, he can enlarge. Such power is not regulation, it is legislation."

Johnson v. Keating, 17 Fed. (2) 50-52, is a case of a non-quota immigrant, and its pertinency here is by analogy only, but in that respect this reasoning by the court is significant:

> "Congress never delegated to immigration officers authority to make a regulation which cuts down substantially the rights given by the act itself. It is probably, perhaps certain, that Congress could not delegate such substantive legislative power."

> "The language in Section 13 (b) that such non-quota immigrant may be let in 'under such conditions as may be by regulations prescribed' does not give authority to prescribe regulations which do not operate 'for the enforcement of the provisions of this act' (Section 24), but operate to enlarge the excluding features of the act."

Authorities cited by the Appellant (brief pp. 12-13) are cases of immigrants or non-quota immigrants, and are not pertinent to the question involved here.

Appellant's theory that the *Mrs. Gue Lim* case has no application to the present case, is directly disputed by the Department of State. Appellant's brief, pp. 11 and 12, cites Consular Regulations, Article XXII, Section 372, Note 8, recognizing the *Mrs. Gue Lim* doctrine that the wife of a domiciled merchant

> "has no status upon which a Section 6 Certificate could properly be issued."

The requirement that this visae should be on an instrument of a different character from Sec. 6 Certificate, is but another attempt of the Executive Departments to avoid the reasoning and effect of the *Mrs. Gue Lim* decision.

The whole question here involved, it seems to us, is summed up in the statute itself as construed by the court decisions we have cited. The Appellee is seeking entry, not on his own status, but on the status of his father. Neither by law, rules and regulations, nor in practice is this father, a domiciled merchant, required to have consular visae as a condition of his admission or readmission. That which cannot be required of the father, cannot be required of the minor

son seeking entry solely on his father's status. *Mrs. Gue Lim* and *Cheung Sum Shee* cases, *supra.* Act of 1924, Section 3 (6).

We respectfully submit that the order appealed from should be affirmed.

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No. 6855

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

10

LUTHER WEEDIN, as United States Commissioner of Immigration at the Port of Seattle, Washington,

Appellant,

vs.

UNG SUE CHU,

Appellee.

APPELLEE'S PETITION FOR A REHEARING

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Honorable Jeremiah Neterer, Judge.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Honorable Jeremiah Neterer, Judge.

To the Honorable Curtis D. Wilbur, Presiding Judge, and to the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Appellee herein respectfully petitions the Court for a rehearing of this cause, and for a reconsideration of the judgment herein entered and filed on May 3, 1933, upon the following grounds:

I.

That this decision, if permitted to remain unaltered, can afford a new ground for excluding the wives and

minor children of regularly domiciled Chinese merchants in the United States.

II.

The importance of the question involved is not so much that it affects the rights of the appellee in this cause, but that by this decision the avenue is open for departmental rules and regulations which can emasculate a treaty right which has only been maintained since the treaty with China from the assaults of the exclusionists and sustained by every decision of this Court and the United States Supreme Court to this date; and this only after the bitterest efforts on the part of the Labor Department to break down the effect of the *Gue Lim* case, 176 U. S. 459, and the *Cheung Sum Shee* case, 268 U. S. 336.

III.

That such a result can be accomplished is not theory. It has been done in the instant case, for the appellee has been excluded because the Consul was not convinced of the relationship; yet the Labor Department concedes the relationship to be a fact; and the Labor Department under the laws of the United States, in the language of the *Polymeris* case, 284 U. S. 279, "is the only voice authorized to express its will."

IV.

This Court by its decision approves a practice which permits this consular official, **whose favorable endorsement of an application is absolutely meaningless,** and **does not give the applicant even a presumptive right of admission,**

to deny the applicant the right to have his application passed upon by the duly constituted authorities.

It may possibly have occurred that we did not make ourselves clear in our brief and oral argument, but the opinion as filed overlooks the essential points in the laws. This appellee was excluded on the ground that he was "without a passport or any official document in the nature of a passport, visaed or authenticated by an American consular officer."

I.

WIFE AND/OR MINOR CHILDREN OF A CHINESE MERCHANT ARE NOT AN IMMIGRANT UNDER THE PROVISIONS OF THE IMMIGRATION LAW OF 1924.

First, as to the visa: Nobody will dispute the fact that Congress could require these exempt Chinese aliens to procure visas if it desired to do so; but Congress has not made such a requirement, and no executive officer has authority to do so.

This Court cites in support of its opinion *U. S. ex rel. London v. Phelps,* 22 Fed. (2) 288, and *Tom Tang Shee,* 63 Fed. (2) 191, **but those were cases of immigrants.** There is no analogy between an **immigrant** and this appellee. The Supreme Court of the United States has said so in the following unmistakable language:

> The Supreme Court in the case of Cheung Sum Shee, et al., v. Nagle, 268 U. S. 336, stated that "An alien entitled to enter the United States solely to carry on trade under an existing treaty of commerce and navigation **is not an immigrant** within the meaning of the Act, section 3 (6), and, therefore, is not absolutely excluded by section 13", and, referring to

the wives and minor children of merchants, stated that "In a very definite sense they are specified by the Act itself as **'nonimmigrants'**. They are aliens entitled to enter in pursuance of a treaty as interpreted and applied by this country twenty-five years ago."

Section 3 of the Immigration Act of 1924 says that

"No **immigrant** shall be admitted to the United States unless he (1) has an unexpired visa * * *."

It is only **immigrants** that are required to have a visa. The Supreme Court says that Chinese merchants, their wives and minor children are **not immigrants**, and no other reasonable construction can be placed upon the language used in the Immigration Act of 1924. If Congress intended that Chinese merchants, their wives and minor children should also secure visas, it would have said so in plain language: that "no **alien** shall be admitted to the United States unless he has an unexpired immigration visa," instead of "no **immigrant.**"

The Court in its opinion herein referring to *Mrs. Gue Lim* case states:

"The court held that the provisions of the Act of 1884 for certificates and visas must be construed as inapplicable to those members of several Treaty Privileged Classes of the Chinese for whom compliance with the terms of the Act **was an absolute impossibility.**"

We desire to respectfully point out that in our opinion this language evidences a misconstruction of the reasoning of the *Gue Lim* decision.

The Court's denial of the certificate requirement was not because of the "**absolute impossibility**" of securing,

nor of the fact that the wife had no status of her own, but it was because she was coming **solely on her status.** The language of the Court is this:

> "The question is, whether under the Act of 1884, construed in connection with the Treaty of 1880, the wife of a Chinese merchant, domiciled in this country, may enter the United States without a certificate, **because she is the wife of such merchant.**
>
> Although the Third article of the Treaty of 1894 does speak of certificates for Chinese subjects therein described, who already enjoy the right to enter the country, the question recurs whether the certificate of the husband, who himself enjoys the rights, is not sufficient for the wife, the fact being proved or admitted that she is his wife. * * * But the question would still remain, whether the wives of the members of the classes privileged to enter were not entitled themselves to enter by reason of the right of the husband and without the certificate mentioned in the Act of 1884."

The above quotation is from page 463 of the report, and after reviewing some authorities, the Court makes decision as follows:

> "In our judgment, the wife in this case was entitled to come into the country without the certificate mentioned in the Act of 1884."

After this definite and final decision in the case, the Court proceeds to give consideration to other classes, who are admissible under the Treaty—merchants, students, travelers, and the like—and it then proceeds to say (over on page 466):

> "It is plain that in this case the woman could not obtain the certificate **as a member of any of those specially enumerated classes.** * * * She is neither

> an official, a teacher, a student, * * *. She is simply the wife of a merchant, who is himself a member of one of the classes mentioned in the Treaty as entitled to admission."

We think this language of the Court conclusively establishes the admissibility of the wife under her husband's status, or, as it might be stated, under her status as the wife of a merchant, and that the Court's reference to the impossibility of her securing an independent certificate of her own was made simply to emphasize the soundness of the conclusion already reached and announced.

And yet,

> "in the case of these minor children" (*Mrs. Gue Lim* case, page 468), "the same result must follow as in that of the wife. All the reasons which favor the construction of the statute as exempting the wife from the necessity of securing a certificate apply with equal force to the minor children of a member or members of the classes admitted. They come in by reason of their relationship to the father, and whether they accompany or follow him, a certificate is not necessary in either case."

II.

A MERCHANT IS NOT REQUIRED TO PROCURE A VISA FOR READMITTANCE.

The opinion in the instant case further says:

> "No one questioned the duty of a 'merchant' himself to get the proper papers as a condition to his readmittance."

The Court is under misapprehension, or has misinformation as to the practice in this respect. No certificate

or visa requirement is made as to a domiciled merchant seeking "readmittance." Indeed, the rule relied on in this case (see Appellant's Brief, pages 8 and 9), makes no such requirement. The visa requirement is not for domiciled merchants, but only for their wives and minor children.

Under the authority of the *Mrs. Gue Lim* case, to the effect that wives and minor children are "part" of the husband, it seems unusual, if not absurd, to require from them a certificate which is not required from the husband.

These domiciled merchants, admitted prior to July 1, 1924, go and come upon an immigration return certificate without any visa requirement.

III.

A VISA ON A SEC. 6 CERTIFICATE ISSUED BY CHINESE GOVERNMENT GIVES HOLDER PRIMA FACIE RIGHT OF ENTRY.

If this Court refers to the Section Six certificate issued by the Chinese Government upon a first entry into this country, which must be visaed by the consul, that is a provision of the statute and the treaty. That document gives him the prima facie right to enter this country upon presentation thereof.

In that regard Rule 4 of the Chinese rules provides:

> "A Chinese presenting the certificate prescribed by Section 6 of the Exclusion Act of July 5, 1884, in proper form, and accompanied by the necessary documents, duly visaed by a U. S. consular officer, shall be admitted, so far as the exclusion laws are concerned, upon identification of the proper holder of

> 'the certificate, unless such certificate is controverted, and the facts stated therein disproved upon investigation and examination. **Such certificate is prima facie evidence of the facts set forth therein** * * *. In accordance with instructions issued by the Department of State, consular officers to whom such certificates are presented, and by whom the accompanying documents are visaed, will forward to the immigration official in charge at the proposed port of entry a report of the completed investigation conducted by him, upon which the visa was issued, which shall include a recital of the family history of this applicant. Such report shall be filed with the record of the case for further reference.''

So we see, from the rule itself, and as a matter of fact, from the treaty, provision for the obtaining of such a certificate by the Chinese person from the Chinese Government or other foreign government, of which at the time such Chinese person shall be a subject. (See *Nagel v. Loi Hoa,* 72 L. Ed. 381.) In other words, if a Chinese merchant, having procured a certificate from his government, and the American consul having visaed the same, he is admitted into this country merely upon being identified by comparison with the picture on the visa with his physical person. The certificate and visa are prima facie evidence of the facts therein contained. This was the procedure set up in the treaty, and it is but reasonable that a Chinese subject coming to this country for the first time, in order to prove his mercantile status in China, that the place to prove it would be where the proof was available; and notwithstanding the fact that he obtained a certificate from the Chinese Government, he would have to submit proof to the satisfaction of the American consul before such consul would visa the cer-

tificate; but at least, when the consul put his visa upon this certificate, it was prima facie evidence of the Chinese' right to enter.

IV.

A VISA PROCURED BY WIFE OR MINOR CHILD OF MERCHANT DOES NOT GIVE HOLDER EVEN A PRIMA FACIE RIGHT OF ENTRY. IT IS MEANINGLESS. IF PROCURED IT ONLY GIVES RIGHT OF A HEARING BEFORE LABOR DEPARTMENT.

The Chinese Rules of October 1, 1926 (Rule 9) of the Immigration Department read:

> "The lawful wife and alien minor children of an alien Chinese merchant, specified in Rule 2 are admissible, whether such wife and minor children accompany the husband or father or follow to join him. Wives and alien minor children of alien Chinese are not admissible under any specific statutory authority, but under the decision of the United States Supreme Court, construing the provisions of the treaty of 1880, and holding they are not affected by subsequent legislation (268 U. S. 1, 336) such wives and minor children are therefore exempted from the requirement of obtaining the certificates prescribed by Section 6 of the Act of July 5, 1884 (268 U. S. 336) and are excepted from the provisions of Sections 5 and 13 C of the Immigration Act of 1924 (176 U. S. 459).
>
> In every application for entry there shall be exacted **convincing** proof of the relationship affirmed as the basis for admission; and the alleged husband and father, if accompanying the wife and minor children, must demonstrate as a condition precedent to their admission his own admissibility to the United States; or, if he is a resident of the United States at the time they apply for admission, and if he himself was origi-

nally admitted or entered before July 1, 1924, that he has been on an exempt status for the year preceding the application for admission of his wife or minor children, his testimony as to status being supplemented by two or more credible witnesses other than Chinese. The burden of proof to demonstrate admissibility to the United States is placed upon every applicant for entry under Section 23 of the Immigration Act of 1924."

We most strongly urge that the procurement of a visa by the applicant added no force or weight to his application for entry into the United States. He must prove that right by independent testimony under the rules and regulations of and by the Labor Department, which is the **only** agency of the government which can admit him. Now, it would be absurd to insist upon a procurement of a visa, and then not give it any force or effect; but that is just what happens here. Of what force or effect is the consular visa required of the appellee? ABSOLUTELY NONE! If he had the visa, it would not entitle him to enter the country, but he would still be subjected to the most rigid inquiry as to his relationship, and as to the mercantile status of his father. If he hasn't the visa, he cannot get a hearing. If he has the visa, he can get a hearing, but any finding of the consul would be absolutely useless and worthless to him in this hearing.

As to the requirement that such Chinese applicant must have a "passport or official document in the nature of a passport": This clause was evidently taken from the Immigration Rule (not the Chinese Exclusion Rules) No. 3, subdivision F, paragraph 2, which, in turn, was taken from Executive Order No. 4813 promulgated by President Coolidge, February 21, 1928 (Immigration Rules pages

100-102). But it is evident that this executive order was not intended to apply to Chinese Treaty merchants, for it is stated parenthetically in the first paragraph of said Executive Order No. 4813 that

> "(In addition to the general immigration laws and regulations there are special laws and regulations governing the admission of Chinese.)"

In the second place, the Chinese rules and regulations do not require treaty merchants and the members of their families to secure a passport or official documents in the nature of passports, but in lieu thereof the Chinese Exclusion rules provide for an entirely different kind of document. Rule 9, subdivision 3, provides for the preinvestigation of the exempt status of the husband or father upon an affidavit filed by him with the immigration officials; and if his exempt status is approved, the immigration officials are required to return to him the original copy of the affidavit submitted in the case and put a notation thereon in red ink, as follows:

> "Exempt status of affiant ..... conceded this date on basis of proof thereof submitted."

This affidavit, with the above notation thereon, is delivered to the husband or father with the suggestion that it be transmitted abroad for the use of the alleged wife or child in applying to an American consul for a visa. It will be noted that this document is neither a passport nor an official document in the nature of a passport, and, as previously stated, there is nothing in the immigration laws which requires such alien to secure a visa.

The above mentioned Executive Order No. 4813 was held to be invalid in so far as it was in conflict or in

excess of the requirements of the Immigration Act of 1924. See

Johnson v. Keating, 17 Fed. (2d) 50 (C. C. A. 1st), and

Serpico v. Trudell, 46 Fed. (2d) 669 (D. C. Vermont).

V.

EXECUTIVE OFFICERS HAVE NO RIGHT TO MAKE A RULE OR REGULATION WHICH THE LAW ITSELF DOES NOT REQUIRE.

The executive officers of the Government, including the President, have no authority to make any rules or regulations except as authorized by Congress, and they cannot make a requirement which the law does not authorize, or make a regulation including a class of persons, or things to be done, which the law itself does not require. In other words, the authority to prescribe regulations for the enforcement of an act of Congress does not authorize regulations enlarging or restricting the provisions of the act. This point is so well settled that citation to authorities does not appear necessary, but see the following cases:

Morrill v. Jones, 106 U. S. 466;

United States v. George, 228 U. S. 14;

United States v. United Verde Copper Co., 196 U. S. 207;

Leong Youk, 90 Fed. 648.

This Honorable Court, in *Shizuko Kumanomido v. Nagel,* 40 Fed. 42, held that

> "Rules and regulations prescribed by Immigration Commissioner, if conflicting with Congressional act or treaty, were, to that extent, void."

We can see no difference between the rules and regulations 58 and 59, set out in that opinion, and the rules and regulations with which we are confronted in the present case. In the *Kumanomido* case, supra, Rule 58 provided, among other things:

> "In order to obtain a visa under the statutory and treaty provisions referred to, the applicant must show that he is going to the United States in the course of business, which involves, substantially, trade or commerce between the United States and the territory stipulated in the treaty;"

and, as said by this Court:

> "These regulations purport to restrict the right to enter the United States to those engaged in trade between Japan and the United States, wholesale or retail. If these regulations conflict with an Act of Congress or with a treaty, which is the law of the land (U. S. Const., art. 6, cl. 2) they would to that extent be void." (Citing *Johnson v. Keating,* supra and other cases.)

And this Court went on to show that any such requirement by departmental rule was a limitation by the act of the Department upon the treaty right conferred upon the applicant, and was invalid.

And in the *Kumanomido v. Nagle* case, supra, Judge Wilbur used the following language which should guide the decision in the instant case:

> "The wives and minor children of resident Chinese merchants were guaranteed the right of entry by the treaty of 1880 and certainly possessed it prior to July 1st when the present Immigration Act became effective. (United States v. Mrs. Gue Lim, 176 U. S. 459, 20 S. Ct. 415, 44 L. Ed. 544, supra.) That act

must be construed with the view to preserve treaty rights unless clearly annulled, and we cannot conclude that, considering its history, the general terms therein disclose a congressional intent absolutely to exclude the petitioners from entry.

In a certain sense it is true that petitioners did not come 'solely to carry on trade.' But Mrs. Gue Lim did not come as a 'merchant.' She was nevertheless allowed to entry, upon the theory that a treaty provision admitting merchants by necessary implication extended to their wives and minor children. This rule was not unknown to Congress when considering the act now before us.

Nor do we think the language of section 5 (USCA Par. 205) is sufficient to defeat the rights which petitioners had under the treaty. In a very definite sense they are specified by the act itself as 'non-immigrants.' They are aliens entitled to enter in pursuance of a treaty as interpreted and applied by this court twenty-five years ago.

In U. S. v. Mrs. Gue Lim, 176 U. S. 459, 20 S. Ct. 415, 418, 44 L. Ed. 544, it was held that a reasonable construction of the treaty and of the Chinese Exclusion Act required the admission of the wife and minor children as an incident to the right of the merchant himself, and there stated the rule that should control the judiciary in the interpretation of statutes where a strict construction of the statute would conflict with a treaty of the United States, as follows:

'The court should be slow to assume that Congress intended to violate the stipulations of a treaty so recently made with the government of another country * * *. Aside from the duty imposed by the Constitution to respect treaty stipulations when they become the subject of judicial proceedings, the court

cannot be unmindful of the fact that the honor of the government and the people of the United States is involved in every inquiry whether rights secured by such stipulations shall be recognized and protected. And it would be wanting in proper respect for the intelligence and patriotism of a co-ordinate department of the government were it to doubt, for a moment, that these considerations were present in the minds of its members when the legislation in question was enacted.' We ought, therefore, to so consider the act, if it can reasonably be done, as to further the execution, and not to violate the provisions of the treaty.

In Cheung Sum Shee v. Nagle, 268 U. S. 336, 45 S. Ct. 539, 540, 69 L. Ed. 985, the court, following the rule announced in the Gue Lim case, supra, said:

'That act must be construed with the view to preserve treaty rights unless clearly annulled, and we cannot conclude that, considering its history, the general terms therein disclose a congressional intent absolutely to exclude the petitioners from entry.' ''

As said by the Supreme Court of the United States in the oft-quoted case of *Kwock Jan Fat v. White,* 63 L. Ed. 1010:

''The acts of congress give great power to the Secretary of Labor over Chinese immigrants and persons of Chinese descent. It is a power to be administered, not arbitrarily and secretly, but fairly and openly, under the restraints of the tradition and principles of free government, applicable where the fundamental rights of men are involved, regardless of their origin or race.''

By the same token, the powers of the Secretary of Labor should not be enlarged by compelling a double

hearing, one before the consul in China, from which there is no appeal, and upon the consul's giving his so-called "approval" to have another hearing when the applicant arrives in this country, from which there is not only an appeal to the Secretary of Labor, but a review by the courts, within limits amply defined, to prevent an abuse of the extraordinary power granted to the Secretary of Labor.

By this circumvention of imposing an impossible condition, a substantial right is taken away from not only this appellee (the hardship of whose individual case we have not stressed, but who should not be the forgotten man), whom the Labor Department had found was entitled to enter into the United States, but the great principle is involved that if this rule is countenanced by the Court, the arbitrary decision of the consul can automatically result in the exclusion of the wife and minor children of all lawfully domiciled merchants from entry into this country. Surely, treaty rights should not be subject to the whim and caprice of some vice-consul in China. Even from the adverse decision of the Secretary of Labor there is an appeal; but from the vice-consul's whim or caprice the appellee is helpless.

In view of the foregoing facts and the laws applicable thereto, as the same appear from the record herein, your petitioner feels that this Honorable Court was in error in holding that the requirement that the minor son of a lawfully domiciled Chinese merchant must be excluded because he was without a passport or any official documents in the nature of a passport, visaed or authenticated by an American consular officer.

Your petitioner therefore prays that his petition for a rehearing herein be granted; that the order of the District Court of the United States for the Western District of Washington, Northern Division, granting the writ of habeas corpus and ordering the appellee and petitioner released from the custody of the Commissioner of Immigration, be sustained.

Dated, San Francisco,
June 2, 1933.

Respectfully submitted,
FRED H. LYSONS,
J. H. SAPIRO,
O. P. STIDGER,
Attorneys for Appellee and Petitioner.

CERTIFICATE OF COUNSEL.

Fred H. Lysons, J. H. Sapiro and O. P. Stidger, the attorneys for the appellee and petitioner, hereby certify that in their judgment the foregoing petition for a rehearing is well founded, and that said petition is not interposed for purposes of delay.

Dated, San Francisco,
June 2, 1933.

FRED H. LYSONS,
J. H. SAPIRO,
O. P. STIDGER,
Attorneys for Appellee and Petitioner.

No. 6856

United States

Circuit Court of Appeals

For the Ninth Circuit.

HARRY A. DAUGHERTY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of Record.

Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 6856

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index.

[1*] DOCKET No. 41,905.

HARRY A. DAUGHERTY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

APPEARANCES:

For Petitioner: ALBERT L. HOPKINS, Esq.
JAY C. HALLS, Esq.
SAMUEL H. HORNE, Esq.

For Respondent: F. R. SHEARER, Esq.

DOCKET ENTRIES.

1928.

Dec. 15—Petition received and filed. Taxpayer notified. (Fee paid.)

Dec. 17—Copy of petition served on General Counsel.

1929.

Jan. 31—Answer filed by General Counsel.

Feb. 20—Copy of answer served on taxpayer—General Calendar.

Oct. 18—Motion to place on the Chicago, Ill., circuit calendar filed by taxpayer. 10/-21/29 granted.

1930.

June 25—Hearing set July 18, 1930, at Milwaukee, Wisc.

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*Page-number appearing at the top of page of original certified Transcript of Record.

1930.

July 15—Hearing held before Mr. S. J. McMahon, Div. 16, on merits. Petitioner's brief due Oct. 1, 1930; reply Oct. 25, 1930, and respondent's brief due Oct. 15, 1930.

July 31—Transcript of hearing of July 15, 1930, filed.

Sept. 30—Brief and proposed findings of fact filed by taxpayer. 10/11/30 copy served on General Counsel.

Oct. 15.—Brief filed by General Counsel.

Oct. 25.—Reply brief filed by taxpayer.

Oct. 28—Copy of reply brief served on General Counsel.

1931.

Oct. 29—Findings of fact and opinion rendered—S. J. McMahon, Div. 16. Judgment will be entered for respondent. Trammell dissents; Smith agrees with dissent.

Oct. 31—Decision entered—S. J. McMahon, Div. 16.

Dec. 15—Motion to fix amount of bond in the amount of $18,000 filed by taxpayer.

Dec. 16—Order fixing amount of bond at $18,500.00 entered.

1932.

Feb. 11—Supersedeas bond in the amount of $18,500.00 approved and ordered filed.

[2] 1932.

Feb. 11—Petition for review to U. S. Circuit Court of Appeals (9) with assignments of error filed by taxpayer.

Feb. 11—Proof of service filed.

1932.

Mar. 29—Stipulation for extension to May 11, 1932, to settle evidence and transmit record filed.

Mar. 30—Order enlarging time to May 11, 1932, for preparation of evidence and delivery of record entered.

Apr. 20—Statement of evidence lodged.

Apr. 20—Notice of the lodgment of statement of evidence with hearing set 5/4/32 filed.

Apr. 20—Praecipe filed—proof of service thereon.

Apr. 20—Proof of service of statement of evidence with notice of hearing on 5/4/32 filed by taxpayer.

May 4—Notice of appearance of Samuel H. Horne as counsel for taxpayer filed.

May 4 & 5—Hearing had before S. J. McMahon, Division 16, on approval of statement of evidence. Amendment to answer filed. Statement approved.

May 10—Order enlarging time to June 11, 1932, for transmission and delivery of record *sur* petition for review entered.

May 5—Statement of evidence approved and filed.

[3] Filed Dec. 15, 1928.

United States Board of Tax Appeals.

DOCKET No. 41,905.

HARRY A. DAUGHERTY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION.

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:AR:B–9:ML–60D) dated October 17, 1928, and as a basis of his proceeding alleges as follows:

1. The petitioner is an individual residing at 424 Melrose Street, Chicago, Illinois.

2. The notice of deficiency (a copy of which is attached and marked Exhibit "A") was mailed to the petitioner on October 17, 1928.

3. The taxes in controversy are income taxes for the calendar year 1926 and for the amount of $12,416.40.

4. The determination of tax set forth in the said notice of deficiency is based upon the following error:

The Commissioner erred in including in the income of petitioner for the year 1926 the amount of $47,180.28

paid in that year to the wife of the petitioner for her share or interest in a certain contract.

[4] 5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) Prior to the making of the gift hereinafter described, the petitioner and certain other attorneys had entered into a contract with one Estelle G. Holland and her husband, by which contract the petitioner and said other attorneys were retained to establish the interest, if any of said Estelle G. Holland in a certain trust estate and were to receive as their fees for their services in that behalf a certain proportion of whatever amount should be awarded to or received by said Estelle G. Holland from said trust estate.

(b) On or about January 30, 1924, the petitioner by gift in writing, transferred to Elizabeth M. Daugherty his wife, one-half of his interest in and to said contract. The said gift by petitioner to his said wife of said interest in the said contract was outright and unconditional and without reservation of any interest therein or any control thereof on the part of the petitioner.

(c) At the time of said gift the litigation to which said contract related was pending and undetermined. No settlement had then been arrived at and there was then no assurance that the litigation would terminate successfully or that any settlement could be made. At the time of said gift the value of petitioner's interest in said contract and the value of the interest transferred by petitioner

to his said wife was wholly contingent and undeterminable.

(d) Thereafter, the litigation to which said contract related [5] was terminated by settlement or compromise. In the year 1926 the proceeds of the share or interest in the said contract transferred as aforesaid to the wife of petitioner were paid directly to said wife and not to the petitioner and were received and held by the said wife of petitioner as her own separate property and for her own separate use and disposal. The amount so paid to the wife of petitioner was $47,180.28.

(e) The Commissioner in determining the proposed deficiency for 1926 included in the income of the petitioner for that year the said amount of $47,180.28 paid to and received by the wife of petitioner as aforesaid.

WHEREFORE, the petitioner prays that the Board may hear the proceeding and may redetermine that the said amount of $47,180.28 was not income of the petitioner for the year 1926 and may grant such other and further relief as shall appear proper.

(Signed) ALBERT L. HOPKINS,
THOS. P. DUDLEY, Jr.,
Counsel for Petitioner,
110 S. Dearborn St.,
Chicago, Illinois.

(Signed) RICHARD S. DOYLE,
Counsel for Petitioner,
906 Southern Bldg.,
Washington, D. C.

[6] State of Illinois,
County of Cook,—ss.

Thomas P. Dudley, Jr., being first duly sworn on his oath, deposes and says that he is one of the attorneys for the above-named petitioner and is duly authorized to execute this petition for and on behalf of the said petitioner; that the said petitioner is absent from the City of Chicago, Illinois, where he resides and is not expected to return to the said city until after the time for the filing of this petition shall have expired; that affiant executes this affidavit because of the said absence of the petitioner and the said inability of said petitioner to execute this affidavit within the time allowed for the filing of this petition; that affiant has read the foregoing petition and is familiar with the statements contained therein, and that the same are true to the best of his knowledge, information and belief.

(Signed) THOMAS P. DUDLEY, Jr.

Subscribed and sworn to before me this 14th day of December, 1928.

[Seal] (Signed) RHEA E. BIRNEY,
Notary Public.

EXHIBIT "A."

[7] TREASURY DEPARTMENT,
Washington.

Office of
Commissioner of Internal Revenue.

October 17, 1928.

Mr. Harry A. Daugherty,
Apartment 9–H,
424 Melrose Street,
Chicago, Illinois.

Sir:

In accordance with Section 274 of the Revenue Act of 1926 you are advised that the determination of your tax liability for the years 1925 and 1926 discloses a deficiency of $12,416.40, as shown in the attached statement.

The section of the law above mentioned allows you to petition the United States Board of Tax Appeals within sixty days from the date of the mailing of this letter for a redetermination of your tax liability. However, if you acquiesce in this determination, you are requested to execute the enclosed Form 866 and forward both original and duplicate to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P–7.

Respectfully,
B. H. BLAIR,
Commissioner.
By C. B. ALLEN,
Deputy Commissioner.

Enclosures:

Statement—
Form 866.
Form 882.

[8] STATEMENT.

Oct. 17, 1928.

IT:AR:B-9.
ML-60D.

In re: Mr. Harry A. Daugherty
Apartment 9-H,
424 Melrose Street,
Chicago, Illinois.

Year.	Deficiency in Tax.
1925	None.
1926	$12,416.40
TOTAL	$12,416.40

The report of the Internal Revenue Agent in Charge at Chicago, Illinois, has been reviewed by this office. Your returns have been adjusted as follows:

1925.

Tax liability shown by return.....$1,455.00
Proposed deficiency ..... none

Tax liability included on Form 866.....$1,455.00

1926.

Net Income.

Net income reported on return.....$90,311.36

Add:		
1. Dividends	$3,665.75	
2. Assigned income	47,180.28	$50,846.03
Total		$141,157.39
Deduct:		
3. Dividends on life insurance		59.74
Net income as adjusted		$141,097.65

Computation of Tax.

Net income adjusted	$141,097.65

[9] STATEMENT.

Mr. Harry A. Daugherty.

Brought forward		$141,097.65
Less:		
Dividends	$8,894.03	
Personal exemption	3,500.00	12,394.03
Income subject to normal tax		$128,703.62
Normal tax at 1½% on $4,000.00		60.00
Normal tax at 3% on $4,000.00		120.00
Normal tax at 5% on $120,703.62		6,035.18
Surtax on $141,097.65		19,879.53
Total tax		$26,094.71
Less:		
Earned income credit		206.25

Tax assessable (Amount included on Form 866)	$25,888.46
Tax previously assessed	13,472.06
Deficiency in tax	$12,416.40

Explanation of Changes.

1. Dividends of $3,665.75 accrued and applied on the purchase price of stocks under a stock purchasing plan were omitted from your return for the year the stock was made available.

2. The amount of $47,180.28 representing one-half of compensation for your services as attorney in a suit to construe a will, has been eliminated from your wife's return and included on *your*. It is held by this office that the fee was the original interest which you assigned to your wife and that the entire amount was taxable to you. This adjustment is similar to that referred to in Solicitor's Memorandum 2762, published in Internal Revenue Cumulative Bulletin III–2, page 53.

3. The amount of $59.74 representing dividends on life insurance, has been eliminated as nontaxable in accordance with Article 47 of Regulations 69, relative to the Revenue Act of 1926.

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

[10] Filed Jan. 31, 1929.

United States Board of Tax Appeals.

DOCKET No. 41,905.

HARRY A. DAUGHERTY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ANSWER.

The Commissioner of Internal Revenue, by his attorney, General Counsel, Bureau of Internal Revenue, for answer to the petition filed by the above-named petitioner, admits and denies as follows:

1. Admits all the material allegations contained in paragraph 1 of the petition.
2. Admits all the material allegations contained in paragraph 2 of the petition.
3. Admits all the material allegations contained in paragraph 3 of the petition.

4(a). Denies that the respondent committed error in the determination of the deficiency as alleged in paragraph 4 of the petition.

4(b). Denies that any error was made in the determination of the deficiency referred to in deficiency letter dated October 17, 1928.

5. Denies all the material allegations contained in paragraph 5 of the petition.
6. Denies generally and specifically each and every allegation in the petitioner's petition con-

tained not hereinbefore admitted, qualified or denied.

WHEREFORE, it is prayed that the petitioner's appeal be denied.

(Signed) C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
J. ARTHUR ADAMS,
Special Attorney,
Bureau of Internal Revenue.

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[11] United States Board of Tax Appeals.

DOCKET No. 41,905.

HARRY A. DAUGHERTY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

AMENDMENT TO ANSWER.

Comes now the Commissioner of Internal Revenue by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, and pursuant to and in accordance with leave granted at the hearing of July 15, 1930 (Tr., page 35), amends the answer heretofore filed on January 31, 1929, by substituting in lieu of paragraph 5 of the answer as it now appears the following:

"5. Admits the allegations contained in subparagraph (c) of paragraph 5 of the petition; but denies the remaining allegations contained in paragraph 5 of the petition."

C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
F. R. SHEARER,
Special Attorney,
Bureau of Internal Revenue.

A true copy.
[Seal] Teste: B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

Allowed and ordered filed this 5th day of May, 1932.

(Signed) STEPHEN J. McMAHON,
Member.

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[12] 24 B. T. A. ——.

United States Board of Tax Appeals.

DOCKET No. 41,905.

Promulgated October 29, 1931.

HARRY A. DAUGHERTY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

FINDINGS OF FACT AND OPINION.

Petitioner, an attorney, and other attorneys contracted in writing to conduct law proceedings to establish the rights of an individual in a certain trust estate. Said contract provided that the attorneys were to share equally in 40 per cent of any amount which might be recovered for the client. It was understood and orally agreed among all the parties concerned that petitioner should not be required to render any services in such litigation, subsequent to the making of the contract, in order to receive his portion of the amount recovered, and he did not render services subsequently. He had rendered some professional services previous to the making of the contract. Before any amount was recovered and before there was any assurance that any would be recovered, petitioner made a gift to his wife of one-half of his interest in the contract. Later an amount was recovered and a portion thereof was paid to petitioner's wife in accordance with the assignment of the contract interest to her. Held, that such amount as petitioner's wife was entitled to and received under the assignment is taxable to petitioner, following Lucas vs. Earl, 281 U. S. 111; Edward J. Luce, 18 B. T. A. 923; and John Leo Stack, 22 B. T. A. 707.

JAY C. HALLS, Esq., and E. H. McDERMOTT, Esq., for the Petitioner.

F. R. SHEARER, Esq., for the Respondent.

This is a proceeding for the redetermination of

an asserted deficiency in income tax for the calendar year 1926 in the amount of $12,416.40. It is alleged that the respondent erred in including [13] in petitioner's income for the year 1926 the amount of $47,180.28, paid in that year to the wife of the petitioner for her share or interest in a certain contract.

FINDINGS OF FACT.

The petitioner is an individual residing in Chicago, Illinois.

Petitioner was admitted to practice law in Illinois in 1896. For several years thereafter he was engaged in the general practice in Chicago. In 1915, petitioner was employed as one of the general attorneys of the Standard Oil Company of Indiana. Thereupon he retired from the general practice and had his office in the general offices of that company.

Prior to his employment by the Standard Oil Company of Indiana, while engaged in general practice, petitioner had acted as attorney for Mrs. Estelle Howland (then Mrs. Estelle Jennings) daughter-in-law of John D. Jennings and sister-in-law of Edwin Jennings. In about 1912 petitioner and Robert J. Folonie were engaged in litigation to establish Mrs. Howland's rights in connection with the trust estate created by John D. Jennings, who died in 1889. Petitioner and Folonie spend a great amount of time and effort on the case, which was strenuously contested, but finally the litigation terminated unsuccessfully to Estelle Howland in the Appellate Court of Illinois. Certain adverse interests were represented by the law firm of Camp-

bell and Fischer of Chicago, of which John G. Campbell was a member.

[14] On October 31, 1923, Edwin Jennings, the last surviving son of John D. Jennings, died. Learning of his death, Campbell called petitioner on the telephone and asked him if he still represented Mrs. Howland and petitioner stated that he did. Campbell then stated that in connection with the prior litigation he had studied and briefed the question of Mrs. Howland's rights in the trust estate and that he had reached the conclusion that in view of the death of Edwin Jennings, Mrs. Howland was entitled to a substantial interest therein. Campbell offered to give this brief to petitioner. Petitioner said he would ascertain the wishes of his client with regard to the matter, but that in no event could he handle litigation for her, because his position with the Standard Oil Company of Indiana occupied all of his time and attention. It was orally agreed between Campbell and petitioner that petitioner would not engage in any of the litigation, but that petitioner was simply to furnish the client.

On November 3, 1923, Mrs. Howland conferred with petitioner and informed him that she desired proceedings instituted to establish her rights in the trust estate. At a conference between Mrs. Howland, her husband, petitioner and Campbell at petitioner's offices in the Standard Oil Company building in Chicago, it was agreed that a bill to construe the will should be filed; that all of the work in connection with the proceedings should be performed by Messrs. Campbell and Fischer, and that there

should be paid to the attorneys an amount equivalent to 40 per cent of whatever might be recovered for Mrs. Howland, this amount to be divided equally [15] between Campbell, Fischer, petitioner, and R. J. Folonie, whose name was suggested by petitioner because of his connection with petitioner in the prior unsuccessful litigation for Mrs. Howland. An agreement in writing was entered into as follows:

Chicago, Ill., Nov. 5, 1923.

I hereby appoint HARRY A. DAUGHERTY, ROBERT J. FOLONIE, JOHN G. CAMPBELL AND HERMAN A. FISCHER, Jr., to act as my solicitors and attorneys in all matters pertaining to my interest in the Trust Estate founded by the last Will of John D. Jennings, deceased. They are authorized to commence or participate in, any proceedings they deem necessary in order to establish my interest therein. As their full compensation for services they are to receive an amount equal to forty per cent (40%) of any money or property I am awarded or receive, in connection with the subject matter of said Trust Estate; it being agreed and understood that this compensation is to be in addition to any fees which may be awarded, either to me on account of my solicitors' fees, or directly to my solicitors, by any Court, from the Trust Estate as a whole, on account of legal services rendered by them in any suit or suits which they instituted or participated in involving the subject matter above mentioned, but does not include anything which I may receive directly from the estate of Edwin Jennings, deceased, as distinguished from

said Trust Estate, found by the Will of John D. Jennings, deceased.

(Signed) ESTELLE G. HOWLAND,
FRANCIS H. HOWLAND,
Hoboken, N. J.

Accepted:

HARRY A. DAUGHERTY,
ROBERT J. FOLONIE,
JOHN G. CAMPBELL,
HERMAN A. FISCHER, Jr.,
By H. A. DAUGHERTY.

It was agreed between the attorneys and Mrs. Howland that petitioner and Folonie would be required to do no work whatever in connection with the case.

[16] On November 3, Campbell and Fischer filed the bill to construe the will. There were numerous parties to the litigation and a great deal of time and effort was put on the case by Campbell and Fischer. No time whatever was put in on the case and no work of any kind was done on the case by petitioner or by Folonie, although Campbell signed petitioner's and Folonie's names to the pleadings in the litigation.

On January 30, 1924, petitioner wrote a letter to his wife, enclosing petitioner's copy of the original contract with Mrs. Howland. On the margin of such contract petitioner endorsed an assignment in long-hand as follows:

Chicago, Ill., Jan. 30, 1924.

In consideration of love and affection, I hereby assign to Elizabeth M. Daugherty, my wife, an un-

divided one-half of my interest in and to this contract.

HARRY A. DAUGHERTY.

The letter and the contract with the assignment endorsed thereon were delivered by petitioner to his wife on the evening of January 30 and were retained by her in her private desk at home until requested by petitioner for use in connection with the controversy over petitioner's income tax liability. Petitioner orally advised Campbell of the assignment some time in 1925. The letter from petitioner to his wife was as follows:

Dear Bess:

You have often expressed the desire to build a home according to your own plans, and I had hoped to [17] be able to be in a position to make it possible for you to realize your dream. However, circumstances have always seemed to prevent it. Some two or three months ago I made a contract with Estelle G. Howland of Ho-Ho-Kus, New Jersey, whom I had previously represented in some litigation, to represent her in connection with Mr. R. J. Folonie, J. G. Campbell and H. A. Fischer, Jr., in the prosecution of her claim against the estate of John G. Jennings, deceased, the same to be handled upon a contingent basis of 40% of the amount she might realize, said 40% to be divided equally between the above-named parties.

If we are successful, Mrs. Howland will realize a very substantial amount, and the contingent fee will be correspondingly large. I am therefore assigning to you an undivided one-half interest in

my share of whatever fees may be coming to me under the contract. I hope it will be sufficient to enable you to build the home, or if you should decide not to use it in that way, then I want you to feel at liberty to use the money in any way you see fit.

I am attaching hereto a copy of the agreement on which I have noted your interest.

With all my love, I am as ever,

(Signed) HARRY.

At the time of the gift the litigation to which the contract related was pending and undetermined. No settlement had then been arrived at and there was then no assurance that the litigation would terminate successfully or that any settlement could be made. At the time of the gift the value of petitioner's interest in the contract and the value of the interest transferred by petitioner to his wife was wholly contingent and undeterminable.

In June, 1926, as a result of negotiations between the parties, in which petitioner in no way participated, a settlement of the litigation was agreed upon, by the terms of which $943,605.60 was awarded [18] to Mrs. Howland in satisfaction of her claim. Pursuant to the contract of employment, 40 per cent thereof, or $377,442.24, was duly paid to Campbell and Fischer. Campbell called petitioner to his office in order to figure out just what each attorney was entitled to receive. Petitioner's wife was not invited to such conference. On June 22, 1926, Campbell delivered to petitioner a check in his favor in the amount of $47,180.28 and a check in favor of Mrs. Daugherty in the amount of $47,180.28.

Mrs. Daugherty deposited (or caused to be deposited) this check in an account which she opened in the Illinois Merchants Trust Company, a downtown bank in Chicago. She invested the money in stocks, secured the certificates in her own name, and deposited them in her private safe deposit box. She used the dividends of the stocks entirely for her own purposes and she did not contribute in any way to the household expenses, nor did petitioner derive any benefit whatsoever from the money paid to his wife nor from the securities purchased therewith nor from the dividends received by Mrs. Daugherty on such securities.

In determining the proposed deficiency for 1926 the respondent included in petitioner's income the amount of $47,180.28 received by petitioner's wife.

OPINION.

McMAHON.—The question presented is whether the respondent erred in including in petitioner's taxable income for the year 1926 the amount of $47,180.28, which was paid to petitioner's wife as a result of petitioner's unqualified assignment to her of an undivided [19] one-half interest in the contract of November 5, 1923, with Estelle G. Howland.

Respondent takes the position that the income in question constitutes compensation paid by or on behalf of Mrs. Howland to petitioner for his personal services as attorney, and contends that such income was first taxable income to petitioner, citing Lucas vs. Earl, 281 U. S. 111.

After carefully considering the evidence in the instant proceeding we are of the opinion that the income in question amounted to compensation paid to petitioner for personal services rendered to Mrs. Howland. It is true that petitioner regarded his a nominal representation and there was an understanding, among all the parties concerned in the suit, that petitioner should not be required to render further services with regard to the prosecution of the suit after the contract was entered into. Petitioner did not in fact render services after such time but the evidence discloses that prior to the time the contract was entered into petitioner had rendered some professional services. At the time of the agreement petitioner still represented Mrs. Howland as attorney. At the suggestion of Campbell to petitioner that Mrs. Howland was entitled to a substantial interest in the trust estate, petitioner conferred with her, and brought Campbell and Fischer into the contemplated litigation in her behalf. It is reasonable to infer that he gave her some advice upon the subject. He was present at the conference when it was decided to proceed with the litigation. Under the agreement in question Mrs. Howland agreed that the attorneys, including petitioner, should receive [20] an amount equal to 40% per cent of any money or property she might be awarded as full compensation for services. The case, then, falls within the principle laid down in Lucas vs. Earl, *supra,* wherein it was held that under the Revenue Acts of 1918 and 1921 income derived from salaries, wages or

compensation for personal services are taxable to the person earning the same, even though there was a pre-existing arrangement between such person and his wife to the effect that all such income should be treated as owned by them as joint tenants. The Revenue Act of 1926, with which we are here concerned, is not different in this regard from the Revenue Acts of 1918 and 1921. See sections 210, 211, 212(a) and 213(a) of the Revenue Act of 1926. To the same effect, in principle, are Edward J. Luce, 18 B. T. A. 923, and John Leo Stack, 22 B. T. A. 707.

The petitioner cited Copland vs. Commissioner, 41 Fed. (2d) 501; Eugene Seigel, Executor, 20 B. T. A. 563; Rosenwald vs. Commissioner, 33 Fed. (2d) 423, and Shellaberger vs. Commissioner, 38 Fed. (2d) 566. However, those cases are clearly distinguishable from the instant proceeding, since these cases did not deal with the assignment of income derived from salaries, wages or compensation for personal services.

We hold that the respondent did not err in including the amount in question in petitioner's taxable income.

Reviewed by the Board.

Judgment will be entered for the respondent.

TRAMMELL, Dissenting.—In my opinion, the *res* which gave rise to the income was assigned, not the income from the contract. This distinguishes this case from the principle of the Earl case.

SMITH agrees with this dissent.

[21] United States Board of Tax Appeals,
Washington.

DOCKET No. 41,905.

HARRY A. DAUGHERTY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION.

Pursuant to the determination of the Board, as set forth in its report promulgated October 29, 1931,—

IT IS ORDERED and DECIDED: That there is a deficiency of $12,416.40 for the calendar year 1926.

(Signed) STEPHEN J. McMAHON,
Member.

Entered: Oct. 31, 1931.

A true copy.

[Seal] Teste: B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

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[22] Filed Feb. 11, 1932. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 41,905.

HARRY A. DAUGHERTY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REVIEW.

To the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Your petitioner, Harry A. Daugherty, respectfully shows:

I.

This is a proceeding for review by the United States Circuit Court of Appeals for the Ninth Circuit of a decision of the United States Board of Tax Appeals, entered on October 31, 1931, redetermining a deficiency in income taxes for the calendar year 1926 in the amount of $12,416.40.

II.

The petitioner is an individual and is an inhabitant of the City of Los Angeles, California.

[23] III.

The nature of the controversy is as follows:

The petitioner, an attorney, and other attorneys entered into a contract with one Estelle Howland on November 5, 1923, to represent her in connection with her claim to an interest in a certain trust

estate. The contract provided that the attorneys were to receive forty per cent of the amount which might be recovered. It was understood and agreed among all the parties concerned that petitioner should not be required to render any services in said litigation subsequent to the making of the contract, and he did not subsequently render any services. On January 30, 1924, before any amount was recovered and before there was any assurance that any amount would be recovered, petitioner assigned to his wife a one-half interest in the contract. In 1926, a substantial recovery was obtained and there was paid to the wife of petitioner $47,-180.28, the amount payable to her in accordance with the assignment of the contract. The Commissioner of Internal Revenue has increased petitioner's income for 1926 by the amount of $47,180.28 which was paid to the wife of petitioner, which increase in income resulted in the deficiency complained of.

IV.

The United States Board of Tax Appeals committed the following errors upon which petitioner relies as the basis of [24] this proceeding:

1. Upon the findings of fact made by the Board of Tax Appeals, the Board erred in not holding as a matter of law that the amount of $47,180.28 received in 1926 by the wife of petitioner was not income taxable to the petitioner.

2. Upon the undisputed evidence presented to the Board of Tax Appeals, the Board erred in not holding as a matter of law that said amount of

$47,180.28 paid to petitioner's wife in 1926 did not represent taxable income to petitioner.

3. The Board of Tax Appeals erred in failing to find from all the evidence that the amount of $47,180.28, paid to the wife of petitioner in 1926, did not constitute taxable income to petitioner.

WHEREFORE, your petitioner prays that this court may review the findings of fact, opinion and order of redetermination of the Board of Tax Appeals and reverse the decision of said Board because of the errors aforesaid and direct said Board to redetermine the deficiency, if any, against the petitioner in accordance with law and the evidence, and that this court may grant such other and further relief as to it may appear proper in the premises.

(Sgd.) ALBERT L. HOPKINS,
JAY C. HALLS,
Attorneys for Petitioner.

[25] State of California,
County of Los Angeles,—ss.

Harry A. Daugherty, being first duly sworn, on oath deposes and says that he is the petitioner named in the foregoing petition for review; that he has read the said petition for review and is familiar with the same and that the statements therein contained are true to the best of his knowledge and belief; that he verily believes that he is entitled to the relief therein prayed for and that said petition for review is not filed for purposes of delay.

(Sgd.) HARRY A. DAUGHERTY.

Subscribed and sworn to before me this 2d day of February, A. D. 1932.

[Seal] (Sgd.) M. MAUDE MARRISON,
Notary Public.

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[26] Lodged Apr. 20, 1932. United States Board of Tax Appeals.

Filed May 5, 1932. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 41,905.

HARRY A. DAUGHERTY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STATEMENT OF EVIDENCE.

The above-entitled cause came on for hearing before Honorable Stephen J. McMahon, member of the United States Board of Tax Appeals, on July 15, A. D. 1930, at Milwaukee, Wisconsin, pursuant to notice of hearing theretofore given, there being present the petitioner by his counsel, Jay C. Halls, Esq., and Edward H. McDermott, Esq., and the respondent by his counsel, F. R. Shearer, Esq.

Thereupon, the following proceedings were had and testimony heard by said member. All of the evidence introduced by both parties in the above-entitled cause which is material and necessary to

the determination of the assignments of error set forth by petitioner in its petition for review by the Circuit Court of Appeals of the decision of the Board of Tax Appeals is herein set out in narrative form, except where, for a better [27] understanding of the evidence, the questions and answers are set forth. The exhibits referred to in the testimony are set forth or the substance thereof stated herein and made a part hereof.

TESTIMONY OF HARRY A. DAUGHERTY, FOR PETITIONER.

HARRY A. DAUGHERTY, the petitioner, having first been duly sworn as a witness on his own behalf, upon direct examination, testified as follows:

My full name is Harry A. Daugherty. I live in Chicago, Illinois. I am an attorney.

In 1923 I was General Counsel for the Standard Oil Company of Indiana, which position I had held since 1915. In 1923 I devoted all of my time to the affairs of the Standard Oil Company of Indiana. I did not at that time maintain a law office of my own. I was in the Legal Department of the Standard Oil Company at 910 South Michigan Avenue, Chicago, where the company had its general offices.

I was admitted to practice in 1896. I practiced until 1915 in the general practice. For a period of seven years, from 1900 to 1907, I was chief assistant to Mr. Alfred B. Eddy who was General Counsel for the Standard Oil Company.

(Testimony of Harry A. Daugherty.)

I knew Mrs. Estelle Howland. I knew her through handling business for her for probably ten or twelve years before 1923. I handled litigation for her in the courts of Cook County, both the Trial Court and the Appellate Court, in [28] connection with this same Estate of John Jennings.

I had a talk with her in 1923 with reference to representing her in litigation in connection with the Trust Estate created by John Jennings. The first conversation took place in November, 1923, about the day of the contract or a day or two before the contract, which was November 5, 1923.

In stating the circumstances leading up to that conversation I would like to go back a little bit. In the litigation in which I represented her before Mr. John Campbell, a prominent attorney of Chicago, was the attorney for the Equitable Trust Company, which was the Trustee under the Trust Estate of John Jennings, and the litigation in which I represented Mrs. Jennings, who subsequently became Mrs. Howland, was against the Equitable Trust Company, as Trustee of that Estate, and against Edwin Jennings, the surviving son of John Jennings. I am referring to the Equitable Trust Company of Chicago. Afterwards it was dissolved, as I remember it, or it went out of existence in Chicago. Mr. Campbell represented the Equitable Trust Company in that matter and was opposed to Mr. R. J. Folonie and myself, who represented Mrs. Jennings at that time.

In November, 1923, I noticed in the paper that

(Testimony of Harry A. Daugherty.)

Edwin Jennings had died, and when I got down to the office that [29] morning, Mr. Campbell called me up on the phone and said: "Did you know Mr. Jennings died yesterday?" I said that I had just read that, and he said that in that litigation in which we were opposed to each other he was quite interested in figuring out what interest Mrs. Jennings, now Mrs. Howland, had in the Estate in the event of Edwin's death, and he thought she had a very substantial interest—I think he said about a one-third interest in the Estate—and he said: "I will be glad if you represent her," or he said: "Do you still represent her?" and I said: "Yes, I do." He said he would be glad to let me have his brief if I cared for it.

I said: "John, on account of my connection with the Standard Oil Company, to which I have to devote all my time, I am not engaged in general practise any more, and I will not take on any outside cases, but if you are willing to go along and handle the case, I will undertake to get Mrs. Howland here, and I will furnish the client if you will do the work." That was the way I put it up to him, and I said we would go along on a fifty-fifty basis. He said that was entirely satisfactory to him.

Then I happened to remember that Mr. Folonie was interested with me in the other litigation, and I said that Mr. Folonie was with me in the other litigation and I thought it was only fair that he should be taken in on this case because the other litigation did not result in any substantial fees.

(Testimony of Harry A. Daugherty.)

[30] It was mostly hard work. He said Mr. Fischer, his associate, would be associated with him in this case and suggested that we divide the fee four ways.

I said: "That is entirely agreeable if it will be agreeable to Mrs. Howland, and the understanding is now that I will not have anything to do with the litigation. You will handle that and I am simply to get the client here and then turn her over to you." I immediately got in touch with Mrs. Howland, and she came on within a day or two after I sent word to her. Her husband came with her.

I told her the situation and that "I was not in a position to handle the litigation, could not do it on account of my connection with the Standard Oil Company, but I said: 'Mr. John Campbell, who was the attorney for the Trust Company in the litigation you had before, is a very capable lawyer and so is his associate, Mr. Fischer, Herman Fischer, and men of high standing here; I have the utmost confidence in them, and if it is agreeable to you, I will have them handle the matter and I will have nothing further to do with it and they will be responsible for the litigation'." She said: "If you have confidence in them, that is entirely satisfactory to me, and I appreciate the position you are in."

Then I telephoned Mr. Campbell; he came over to the office, and I introduced him to Mrs. Howland and I told Mr. [31] Campbell in the presence of Mrs. Howland and her husband of the conversation I had had with them, as I have just stated,

(Testimony of Harry A. Daugherty.)

and "Mr. and Mrs. Howland both said the arrangement was entirely satisfactory to them."

Mr. Campbell then said he would go back to his office and finish preparing the bill to be filed to construe the will and asked me to draw up a contract, and I did that on behalf of the four attorneys and Mrs. Howland signed it, and then Mrs. Howland went over to Mr. Campbell's office, "and that was the last time I ever saw Mrs. Howland or ever had any talk with her or had anything to do with the matter except when it came to the final adjustment and except that occasionally I would phone Mr. Campbell and ask him in a general way how the case was going. I did not participate in the preparation of any of the pleadings in the case or in the preparation of the bill. I did not appear in court at any time, did not participate in any of the arguments; I was not present at any of the negotiations leading up to the settlement. I absolutely had nothing further to do with it except in connection with the interest I had in the contract."

Mr. HALLS.—"In your conversation with Mrs. Howland did you state to her what your participation in the case would be after the contract was made?"

WITNESS.—"Oh, yes; I told her distinctly that I could not handle the matter and was not in a position to handle it on account of my connection with the company and that Mr. [32] Campbell and Mr. Fischer would handle the entire litigation."

(Testimony of Harry A. Daugherty.)

Mr. HALLS.—"Was that said in the presence of Mr. Campbell?"

WITNESS.—"That was said in the presence of Mr. Campbell when Mrs. Howland and her husband were there."

(Counsel for petitioner handed Petitioner's Exhibit No. 1 for identification to the witness and asked the witness what the document was. The witness answered that Petitioner's Exhibit No. 1 was the original contract between Mr. and Mrs. Howland and the witness, Robert J. Folonie, John G. Campbell and Herman Fischer, Jr.)

WITNESS.—(Resuming.) The original contract was signed November 5, 1923, which is the date it bears.

(The witness then identified the signatures of Estelle G. Howland and Francis Howland on the contract. The witness stated that he made his own signature to the contract and signed the names of the other attorneys, putting a bracket around them by himself, H. A. Daugherty.)

WITNESS.—(Resuming.) The signatures of the other attorneys were made by authority and consent of the other attorneys. That was never questioned, and the contract has never been questioned at all.

(Counsel for petitioner then handed to the witness Petitioner's Exhibit No. 2 for identification. In response to question the witness stated that Petitioner's Exhibit No. 2 was a duplicate original of the original contract; that it was [33] signed

(Testimony of Harry A. Daugherty.)

in the same manner in which Petitioner's Exhibit No. 1 for identification was signed and by the same parties.)

Mr. HALLS.—"In whose handwriting does the writing on the left-hand side appear?"

WITNESS.—"That is my handwriting."

Mr. HALLS.—"When did you put that on the document?"

WITNESS.—"On the date it bears."

Mr. HALLS.—"What does that state?"

WITNESS.—"January 30, 1924."

(Petitioner's Exhibit No. 1 for identification was offered and received in evidence without objection as Petitioner's Exhibit No. 1.)

(Said document so offered and received in evidence was marked Petitioner's Exhibit No. 1, and made a part of this record).

(Petitioner's said Exhibit No. 1 is as follows:)

PETITIONER'S EXHIBIT No. 1.

"Chicago, Ill. Nov. 5, 1923.

"I hereby appoint HARRY A DAUGHERTY, ROBERT J. FOLONIE, JOHN G. CAMPBELL and HERMAN A. FISCHER, Jr., to act as my solicitors, and attorneys in all matters pertaining to my interest in the Trust Estate founded by the last will of John D. Jennings, deceased. They are authorized to commence or participate in, any proceedings they deem necessary in order to establish my interest therein. As their full compensation

for services they are to receive an amount equal to forty per cent (40%) of any money or property I am awarded or receive, in connection with the subject matter of said Trust Estate; it being agreed and understood that this compensation is to be in addition to any fees which may be awarded, either to me on account of my solicitors' [34] fees, or directly to my solicitors, by any Court, from the Trust Estate as a whole, on account of legal services rendered by them in any suit or suits which they instituted or participated in involving the subject matter above mentioned, but does not include anything which I may receive directly from the estate of Edwin Jennings, deceased, as distinguished from said Trust Estate, founded by the Will of John D. Jennings, deceased.

ESTELLE G. HOWLAND.
FRANCIS H. HOWLAND.

ACCEPTED:

HARRY A. DAUGHERTY,
ROBERT J. FOLONIE,
JOHN G. CAMPBELL,
HERMAN A. FISCHER, Jr."
By H. A. DAUGHERTY.

(Petitioner's Exhibit No. 2 for identification was offered and received in evidence as Petitioner's Exhibit No. 2 with the understanding that it would be connected up with further testimony.)

(Said document so offered and received in evidence was marked Petitioner's Exhibit No. 2 and made a part of this record).

(Testimony of Harry A. Daugherty.)

PETITIONER'S EXHIBIT No. 2.

(Petitioner's said Exhibit No. 2 for identification is identical with Petitioner's Exhibit No. 1 except that on the margin there was endorsed in longhand the following:)

"Chicago, Illinois, Jan. 30, 1924.

"In consideration of love and affection I hereby assign to Elizabeth M. Daugherty, my wife, an undivided one-half of my interest in and to this contract."

"HARRY A. DAUGHERTY."

[35] WITNESS.—(Continuing.) After that endorsement or assignment was made by me on Exhibit No. 2, I gave it to Mrs. Daugherty. She has had it ever since until the question arose with reference to my tax return. Then I asked her to get it and let me have it so I could turn it over to my attorneys. Except as I have indicated, it has been in her possession all of the time since it was delivered to Mrs. Daugherty in 1924. It bears date January 30th, 1924. The assignment is all in my handwriting and is over my signature.

(Counsel for petitioner then handed to the witness Petitioner's Exhibit No. 3 for identification. The witness stated that Petitioner's Exhibit No. 3 for identification was a letter.)

WITNESS.—(Continuing.) Petitioner's Exhibit No. 3 for identification is a letter I wrote to Mrs. Daugherty at the time I turned over the duplicate original contract with the assignment en-

dorsed on the margin. I delivered the letter to her at the same time I gave her the contract with the assignment on it.

(Petitioner's Exhibit No. 3 for identification was offered and received in evidence as Petitioner's Exhibit No. 3 without objection.)

(Said document so offered and received in evidence was marked Petitioner's Exhibit No. 3, and made a part of this [36] record.)

(Petitioner's Exhibit No. 3 is as follows:)

PETITIONER'S EXHIBIT No. 3.

"Dear Bess:

"You have often expressed the desire to build a home according to your own plans, and I had hoped to be able to be in a position to make it possible for you to realize your dream. However, circumstances have always seemed to prevent it. Some two or three months ago I made a contract with Estelle G. Howland of Ho-Ho-Kus, New Jersey, whom I had previously represented in some litigation, to represent her in connection with Mr. R. J. Folonie, J. G. Campbell and H. A. Fischer, Jr., in the prosecution of her claim against the estate of John G. Jennings, deceased, the same to be handled upon a contingent basis of 40% of the amount she might realize, said 40% to be divided equally between the above-named parties.

"If we are successful, Mrs. Howland will realize a very substantial amount, and the contingent fee will be correspondingly large. I am therefore assigning to you an undivided one-half interest in my share of whatever fees may be coming to me under

(Testimony of Harry A. Daugherty.)

the contract. I hope it will be sufficient to enable you to build the home, or if you should decide not to use it in that way, then I want you to feel at liberty to use the money in any way you see fit.

"I am attaching hereto a copy of the agreement on which I have noted your interest.

"With all my love, I am as ever,

(Signed) HARRY."

WITNESS.—(Continuing.) I had nothing to do with the litigation after the contract was entered into, and I told Mrs. Howland that I would not have anything to do with the litigation. I first heard of the settlement along in March, 1926, or maybe [37] later, but I knew a settlement was to be made or likely to be made. The settlement was actually made in June, 1926; I do not remember the exact date. It came to my attention when Mr. Campbell called me up over the phone and told me the case had been settled and that he had received the money which was coming to Mrs. Howland and asked me to come over to his office.

(Counsel for petitioner then handed Petitioner's Exhibit No. 4 for identification to the witness.)

WITNESS.—(Continuing.) I remember distinctly seeing Petitioner's Exhibit No. 4 for identification on the date it bears, June 22, 1926.

(Counsel for petitioner then handed to the witness Petitioner's Exhibit No. 5 for identification.)

WITNESS.—(Continuing.) I received Petitioner's Exhibit No. 5 for identification from Mr. Camp-

(Testimony of Harry A. Daugherty.)

bell or Mr. Fischer, his partner, one or the other. It was in his office.

Petitioner's Exhibit No. 4 for identification is a check for my share of that amount of $47,180.28, a check payable to my order.

Petitioner's Exhibit No. 5 for identification is a check given to me at the same time. It is payable to Mrs. Daugherty for $47,180.28, which is the same amount as the check which was payable to me.

[38] I took Petitioner's Exhibit No. 5 for identification, which is a check payable to Mrs. Harry A. Daugherty, home with me that night and gave it to Mrs. Daugherty.

(Petitioner's Exhibits No. 4 and No. 5 for identification were offered and received in evidence without objection as Petitioner's Exhibits No. 4 and No. 5, respectively.)

(Said documents so offered and received in evidence were marked Petitioner's Exhibit No. 4 and Petitioner's Exhibit No. 5, respectively, and made a part of this record).

WITNESS.—(Continuing.) Mrs. Daugherty deposited the check in the bank in her account. In fact, she opened an account at the bank with a deposit of that check. She never did give me any part of it. She never did give me any proceeds of the $47,180.28 in any way, directly or indirectly, and I never asked her for any. Probably if I had asked her, she would have, but I never asked her for it. I wanted Mrs. Daugherty to be a little bit independent. She never gave me one dollar of the

(Testimony of Harry A. Daugherty.)

income from any of the securities or property which she purchased with this money.

Cross-examination by Mr. SHEARER.

WITNESS.—At the time the checks were delivered to me there were present in Mr. Campbell's office Mr. John Campbell, Mr. Herman Fischer, Jr., and myself. Exhibits [39] No. 4 and No. 5 are the checks of Mr. Campbell and Mr. Fischer. Mr. Fischer, Jr., signed the checks on behalf of that firm.

The two checks were made out and delivered to me instead of one, pursuant to a conversation which I had had with Mr. Campbell in the fall of 1925 "in which I told him I had assigned one-half of my interest in the contract to Mrs. Daugherty and if anything did develop out of the litigation, she was to receive one-half."

I think that conversation was over the telephone, I am quite sure it was. The occasion for that conversation was, I think, that I called Mr. Campbell and asked him how the litigation was coming on, and he said they were having a pretty hot fight and that they were going along. I said: "Well, John, I just wanted to tell you now I have assigned one-half of my interest in contract to Mrs. Daugherty, if we ever get anything out of it, one-half of what is coming to me is to go to her." He said: "All right, Harry, I will have that in mind." There was no written understanding between the attorneys regarding the proportions that we were to share in the fee. There was a verbal understanding that

(Testimony of Harry A. Daugherty.)

we would each have one-fourth of 40%. There was no correspondence. I have known Mr. Campbell for over 25 years, and we have been very good friends, and we did not need any correspondence among ourselves.

Regarding the assignment, I do not know that I ever talked with Herman Fischer until I was over in Mr. Campbell's [40] office at the time the checks were given, but I do know that I talked with Mr. Robert Folonie about it and what I had done, because Mr. Folonie and I had been office associates for five years in the general practice, and we were very close to one another. We got together from time to time to discuss the Jennings case, and I remember discussing it with him.

From November, 1923, to June, 1926, we discussed the case maybe half a dozen times. I could not tell exactly. Just when we would meet we would refer to the case, and some general conversation would ensue.

Mr. Folonie did not do anything in connection with the litigation. He never appeared in court, and he never handled the case. He never even met the client.

I could not tell you how many suits were instituted in that litigation. I presume that it is right that my name and Mr. Folonie's were placed on the bill as attorneys for the petitioner. I think Mr. Campbell, when he signed the pleadings, signed the names of Mr. Folonie and myself.

I drew the contract which has been introduced as

(Testimony of Harry A. Daugherty.)

Exhibit No. 1. I drew it for the purpose of setting out the terms on which the litigation was to be held. I intended that it should correctly reflect the understanding as to the fees which we were to receive.

Petitioner's Exhibit No. 3, which is the letter from myself to my wife, was prepared on the date it bears date, [41] January 30, 1924. I did not intend that the letter should change the terms of the assignment in any way. I may not have been quite as exact or explicit in the letter as I was in the assignment. That was simply a notification to her of what I had done. I just wanted to notify her in that letter that we had made a contract and that I was giving her a half interest in the contract. That was the sole purpose in writing the letter.

Mr. SHEARER.—"Petitioner's Exhibit No. 3 contains in part this:

> 'Some two or three months ago I made a contract with Estelle G. Howland of Ho-Ho-Kus, New Jersey, whom I had previously represented in some litigation, to represent her in connection with Mr. R. J. Folonie, J. G. Campbell and H. A. Fischer, Jr., in the prosecution of her claim against the estate of John J. Jennings, deceased.'

It was your understanding, was it not, at the time you prepared this letter that that statement that you had made a contract to represent the client in connection with these other three men was correct?"

WITNESS.—"I think that is correct. It was a nominal representation so far as I was concerned,

(Testimony of Harry A. Daugherty.)

though, because all of the parties to the arrangement understood I was not to handle the litigation, nor have anything to do with the litigation."

WITNESS.—(Continuing.) I remained with the Standard Oil Company of Indiana until July 1st of this year (1930). During that period I did [42] at one time take on outside legal employment in connection with the Estate of W. B. Cowan, who was the President of the company and who died, and I represented some interest in that Estate. It was almost because of my connection with the company, I might say. I got some fees out of it, but we were interested in seeing that the Estate was handled properly because of Mr. Cowan's long association with the company, and Mr. Robert Stewart, who was General Counsel for the company, was associated with me in that matter.

At the time I entered the employ of the Standard Oil Company I had other clients, but I dropped them just as rapidly as I could because of my connection with the company, severing my connections with my clients and devoting my time exclusively to the Standard Oil Company. At the time I entered the employ of the company I was in pending cases. I represented in particular one of the brewing companies in Chicago, where I was attorney of record in a number of cases, but withdrew quickly after my connection with the Standard Oil Company and they secured other counsel and my appearance was withdrawn and other counsel substituted.

(Testimony of Harry A. Daugherty.)

I do not recall any cases that I had pending in 1915 which I completed for the clients without substituting other attorneys. I was very anxious to get rid of my personal clientele on account of my connection with the company.

I made the arrangements in connection with this [43] Jennings litigation on account of the fact that Mrs. Howland was and had been my client and inasmuch as Mr. Campbell had told me that he thought she had a very substantial interest in the Estate, I was more anxious to make the arrangement with her, particularly so as I was not to have anything to do with handling the litigation.

I absolutely did not have any conversation with Mrs. Daugherty which modified in any way the written instrument which has been introduced here as Petitioner's Exhibit No. 2, or the letter, Exhibit No. 3.

I will say frankly there has been no secret understanding or arrangement between us. I do not know that Mrs. Daugherty has even made her will or if she has, it is without my knowledge. I have not asked her about it, and I have not touched a dollar of the money which I gave her by way of that assignment. I have advised her regarding some investments which she made when she asked me what I thought of them, but they were made entirely by her.

Exhibit No. 4, which is the check payable to my order, was deposited in the Illinois Merchants Trust Company. I made the deposit myself. The other

(Testimony of Harry A. Daugherty.)

check was not deposited by me. She made that for herself. That is my recollection because she had no account at that bank at that time, and I remember taking the check home to her and suggesting that she open an account with that bank. We were living out in Beverly Hills, one of the suburbs [44] of Chicago, and she had her account in the little Calumet Bank, and I did not want her to put that amount of money in a small outlying bank. I do not know under what circumstances the endorsement in the form of a receipt signed by the Illinois Merchants Trust Company on Exhibit No. 5 was made. That was some memorandum that the bank made. I do not know anything about it.

(Mr. Shearer, counsel for respondent, then read the endorsement on the back of Exhibit No. 5, which was as follows:

"Received $47,180–28/100 as correct amount of this check.

ILLINOIS MERCHANTS TRUST COMPANY.")

(Mr. Shearer stated that the endorsement was followed by a longhand signature which he could not read.)

WITNESS.—(Continuing.) Now, it may be, I am not clear about this, that I deposited that check and she came down the next day and signed the signature cards or that she took the check in herself and made that. I do not remember that, but I remember taking the check home and giving it to her, and I am sure she made the deposit herself and opened the account herself.

(Testimony of Harry A. Daugherty.)

Mr. SHEARER.—"If your Honor please, there is one other phase of this matter that I would like to cross-examine on, but the substance of that is already embodied in subparagraph C of paragraph 5 of the petition. The answer in this case, which [45] present counsel did not draw, has denied that allegation. In lieu of any further cross-examination on that, I ask leave to withdraw the denial in so far as it applies to subparagraph C of paragraph 5, and substitute in lieu of the denial an admission that the allegations contained in that subparagraph are true."

Mr. HALLS.—"No objection."

Mr. SHEARER.—"Respondent asks leave to amend the answer heretofore filed on January 31, 1929, by substituting in lieu of paragraph 5 of the answer as it now appears the following:

"(5) Admits the allegations contained in subparagraph C of paragraph 5 of the petition; but denies the remaining allegations contained in paragraph 5 of the petition."

The MEMBER.—"The amendment will be allowed."

Mr. SHEARER.—"I am through with the cross-examination."

(Witness excused.)

TESTIMONY OF JOHN G. CAMPBELL, FOR PETITIONER.

JOHN G. CAMPBELL, having been first duly sworn as a witness on behalf of petitioner, on direct examination testified as follows:

My name is John G. Campbell. I am an attorney at law in the city of Chicago and have been practicing there for 35 years. I have known the petitioner, Harry A. Daugherty, for 25 years.

[46] I had a conversation with him in 1923 with reference to the representation of Mrs. Howland in connection with an interest under the Trust Estate created by the will of John Jennings, deceased. This conversation took place in the early part of November, 1923, I would say the 5th of November, in view of the fact that I heard the contract read here. I had a prior conversation on November 5th. That was my first conversation with reference to the subject matter. Edwin Jennings died on October 31, 1923. On November 1st, the following morning, I called Mr. Daugherty on the telephone and asked him if he had noticed it in the paper, and he said that he had, and I told him that Mrs. Jennings, that was Edwin Jennings' brother's widow—would, in my opinion, have a large interest in John D. Jennings, father of Edwin Jennings, estate. He died—John D. Jennings died in 1889, leaving a will by which the estate was tied up in trust during the lifetime of his children, and I told him that we had briefed the subject some years ago, and that, in our opinion, Mrs. George F. Jen-

(Testimony of John G. Campbell.)

nings, who was then Mrs. *Mrs.* Howland would be entitled to a one-third of John D. Jennings' estate, and I told Mr. Daugherty that I would give him our brief, if he wished it.

"He said he could not take any litigation himself, but if we went on with the litigation, if Mrs. Howland wished to litigate the question, he would be glad to have us go along with [47] him, and my recollection is that on Sunday, which I think would be November 4th—I have not looked it up—on Sunday Mr. Daugherty told me that Mrs. Howland would be in his office on Monday morning, his office being in the Standard Oil Building down on Michigan Avenue, and he would like to have me come down there and meet Mrs. Howland. I went down there and met Mr. Daugherty and Mrs. Howland.

"Mr. Daugherty explained to Mrs. Howland and to me that he could not have any part in the litigation in case there was litigation, that his time was entirely taken up by his work with the Standard Oil Company, and Mrs. Howland told me that it would be perfectly agreeable to her if we should file a bill asking for the construction of the John D. Jennings' will, and I left Mr. Daugherty and Mrs. Howland in Mr. Daugherty's office, and that ended the conversation."

Thereafter, we filed a bill for construction of the will, alleging that Mrs. Howland was entitled to one-third of the Estate, and we subsequently filed an amended bill which we have printed. My recollection is that it contained about 50 pages of printed

(Testimony of John G. Campbell.)

matter. There were a great number of defendants. We first argued a demurrer for two or three days before Judge Friend in the Circuit Court of Cook County, and then when the answers were filed, we took testimony before a Master. The Master's report was sent to court, and then we finally settled the whole Estate.

[48] The settlement was in June, 1926. Mrs. Howland received twenty times the check that I gave Mrs. Daugherty. I figured it up, and we received $943,605.60. Mrs. Howland received 60% and Mr. Folonie received 10%. Campbell and Fischer received 20%, Mrs. Daugherty 5% and Mr. Daugherty 5%.

During the time the litigation was pending Mr. Daugherty did not participate at all in the conduct of the litigation. As far as I know he never read the bill of complaint. He had absolutely nothing to do. He never appeared in court. My talks with him were only to tell him from time to time that we had argued the demurrer or that we were taking testimony before the Master, but the details never. I arranged the details of the settlement on Mrs. Howland's behalf. The other party was represented by Mr. A. B. Williams of the firm of Castle, Williams, Long & Castle. Mr. Daugherty never was present at any time at those negotiations. I do not think I consulted him with reference to the settlement.

I have seen Petitioner's Exhibits Nos. 4 and 5 before. After we made the settlement with Mr.

(Testimony of John G. Campbell.)

Williams and we received the money, I told Mr. Daugherty that we had it, and I asked him to come over to the office so that we could figure out just what each one was entitled to, and Mr. Daugherty came to the office and met Mr. Fischer and me, and I told him exactly what we had received and then made out the two checks [49] representing Mr. Daugherty's share and Mrs. Daugherty's. These are the original checks.

I heard Mr. Daugherty's testimony in reference to the assignment of the one-half interest of his interest in the contract to Mrs. Daugherty. I had a conversation with Mr. Daugherty with reference to that assignment prior to the time the checks were delivered to Mr. Daugherty. My recollection is that the first conversation was over the telephone and fix it as some time in 1925. Mr. Daugherty told me he had assigned a one-half interest to his wife.

Cross-examination by Mr. SHEARER.

WITNESS.—I think the two checks were made out after Mr. Daugherty arrived at the office on that date. I did not call up Mrs. Daugherty and ask her to come to my office.

(Witness excused.)

TESTIMONY OF MRS. HARRY A. DAUGHERTY, FOR PETITIONER.

Mrs. HARRY A. DAUGHERTY, being first duly sworn as a witness on behalf of petitioner, upon direct examination, testified as follows:

(Testimony of Mrs. Harry A. Daugherty.)

My name is Elizabeth M. Daugherty. I am the wife of Harry A. Daugherty, the petitioner, and am living with him now.

I have seen Petitioner's Exhibit No. 2 before. I saw it the night Mr. Daugherty brought it home, November 5, 1923. I received Petitioner's Exhibit No. 3. I received it at the time I received this letter. I received the letter on January 30, 1924. My statement that I received the contract on November 5, [50] 1923, was incorrect. I received the contract (Petitioner's Exhibit No. 2) with the letter.

The letter and the contract were in the nature of a surprise. Mr. Daugherty came home and handed me this letter. I had not an idea what was in it. When I read it, I was a bit overcome. He just simply said: "Here is a little surprise for you," or "present."

I do not know that he said anything to me about any litigation which was pending in connection with the Jennings Estate at that time. He just handed me this letter and said: "Read it. Here is something that may interest you," and I read the letter, of course.

I put the letter and assignment away in my desk. I kept them ever since. They have always been in my possession. They first left my possession when it was necessary in this question of income. Up until that time the letter was in my possession.

Yes, indeed, I have seen Petitioner's Exhibit

(Testimony of Mrs. Harry A. Daugherty.)

No. 5. It was brought to me on the evening of the day it was issued, June 22, 1926. I think I rushed over to the neighbors and showed them the check. I was very much excited over it. After that I deposited it in the Illinois Merchants, it is the Continental-Illinois now.

After I deposited the check in the bank I bought some [51] stocks. I rented a deposit box and put the stocks in the box. The stocks were issued in my name.

I have never given Mr. Daugherty any part of this money, this $47,180.28. I have never given him any of the stock or securities that I purchased with the proceeds of the check. I have had no agreement with him by the terms of which I was to give him back directly or indirectly any part of this money. I never turned over to him any of the dividends from any of the securities or the stocks or the coupons from any of the bonds that I purchased with the proceeds of the check.

Cross-examination by Mr. SHEARER.

WITNESS.—I did not use the proceeds of the check to buy a home.

I do not believe I remember whether I personally deposited that check or sent it with my husband and then went down in a day or two and arranged to make the deposit. It is possible that he may have taken it down to the city with him the next morning because he often saves me the trouble of coming into town.

(Testimony of Mrs. Harry A. Daugherty.)

I did not make any arrangements to purchase any of the securities before I got the check.

Mr. HALLS.—"Petitioner rests."

Mr. SHEARER.—"Respondent rests."

[52] Petitioner tenders and presents the foregoing as a statement of the evidence material to the errors assigned in the petition for review filed in this cause and prays that the same may be settled and approved by the United States Board of Tax Appeals and made a part of the record in this cause.

(Sgd.) JAY C. HALLS,
PETER L. WENTZ,
Attorneys for Petitioner.

Respondent agrees that the foregoing is a correct and complete statement of the evidence material to the errors assigned in the petition for review filed in this cause and agrees that the same may be settled and approved and made a part of the record in this cause, without further notice to him of the lodging or the presentation thereof.

_____,

General Counsel, Bureau of Internal Revenue,
Attorney for Respondent.

[53] Approved and ordered filed this 5th day of May, 1932.

(S.) STEPHEN J. McMAHON,
Member.

CAMPBELL & FISCHER
ATTORNEYS-AT-LAW
1542 FIRST NATIONAL BANK BUILDING

No. 1394

CHICAGO, June 22, 1926

PAY TO THE ORDER OF Mary R. Daugherty $47,180.28

Forty seven thousand one hundred eighty and 28/100 DOLLARS

MEMBER FEDERAL RESERVE SYSTEM.

To UNION TRUST COMPANY,
CHICAGO, ILL. (2-9)

CAMPBELL & FISCHER

BY Clement E. Fischer

4-A

8-4

Pay to order of
Lillyan Mae Harris
Mary R. Daugherty

U S BOARD OF TAX APPEALS
DIV. 15 DOCKET 41905
MARKED FOR IDENTIFICATION
JUL 15 1930
PETITIONER'S EXHIBIT 11
RESPONDENT'S

PAID THROUGH CHICAGO CLEARING HOUSE
PAID
JUN 23 1926
CHECKERS
TO
ILLINOIS MERCHANTS TRUST COMPANY

U. S. BOARD OF TAX APPEALS
DIV. 15 DOCKET 41905
ADMITTED IN EVIDENCE
JUL 15 1930
PETITIONER'S EXHIBIT 4
RESPONDENT'S

CAMPBELL & FISCHER
ATTORNEYS-AT-LAW
1542 FIRST NATIONAL BANK BUILDING

No. 1395

CHICAGO, June 22 192

PAY TO THE ORDER OF Mrs. Harriet P. Dougherty $47180

Forty seven thousand one hundred eighty and 80 DOLLARS

MEMBER FEDERAL RESERVE SYSTEM.

CAMPBELL & FISCHER

To UNION TRUST COMPANY,
CHICAGO, ILL. (2-9)

BY

11

5-9

Pay to order of
Illinois Merchants Trust Co
Mrs Harry A Dougherty
Harry A Dougherty

PAID THROUGH CHICAGO CLEARING HOUSE
JUN 24 1924
CHECKERS
TO
ILLINOIS MERCHANTS TRUST CO.

U. S. BOARD OF TAX APPEALS
DOCKET 4198
JUL 15 1930
PETITIONER'S EXHIBIT 5

U. S. BOARD OF TAX APPEALS
DOCKET 4198
JUL 15 1930
PETITIONER'S EXHIBIT 5

RECEIVED Mrs. Harriet P. Dougherty
Merchants Loan DOLLARS
AS CORRECT AMOUNT OF THIS CHECK.
ILLINOIS MERCHANTS TRUST COMPANY

8-5

[56] Filed Apr. 20, 1932. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 41,905.

HARRY A. DAUGHERTY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare and transmit a transcript of the record in this cause to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and include in said transcript copies duly certified as correct of the following documents:

1. The docket entries of proceedings before the Board in the above-entitled cause;
2. Pleadings before the Board;
3. Findings of fact, opinion and decision of the Board;
4. Petition for review;
5. Statement of evidence as settled and approved;
6. Order or orders, if any, enlarging the time for the settlement of the statement of evidence and the preparation and delivery of the record. Not included in transcript.
7. This praecipe.

Said transcript to be prepared as required by law and the [57] rules of the United States Circuit Court of Appeals for the Ninth Circuit.

ALBERT L. HOPKINS,
JAY. C. HALLS,
PETER L. WENTZ,
Attorneys for Petitioner.

Dated: This 20th day of April, A. D. 1932.

Receipt of a copy of the foregoing praecipe is hereby admitted this 20th day of April, A. D. 1932.

C. M. CHAREST,
Attorney for Respondent on Review.

Dated: This 20th day of April, A. D. 1932.

---

[58] DOCKET No. 41,905.

HARRY A. DAUGHERTY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CERTIFICATE OF CLERK U. S. BOARD OF TAX APPEALS TO TRANSCRIPT OF RECORD.

I, B. D. Gamble, Clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages 1 to 57, inclusive, contain and are a true copy of the transcript of record, papers and proceedings on file and of record in my office as called for by the praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 20th day of May, A. D. 1932.

[Seal] B. D. GAMBLE,
Clerk.

[Endorsed]: No. 6856. United States Circuit Court of Appeals for the Ninth Circuit. Harry A. Daugherty, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of Record. Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filed May 27, 1932.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6856

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

OCTOBER TERM, A. D. 1932.

HARRY A. DAUGHERTY, Petitioner, vs. **COMMISSIONER OF INTERNAL REVENUE,** Respondent.	Petition for Review of Decision of United States Board of Tax Appeals.

BRIEF FOR PETITIONER.

ALBERT L. HOPKINS,
JAY C. HALLS,
PETER L. WENTZ,
Attorneys for Petitioner.

HOPKINS, SUTTER, HALLS & DeWOLFE,
Of Counsel.

CHICAGO LAW PRINTING CO., 40 S. CLINTON ST. FRANKLIN 6521

INDEX.

Statute Cited.

List of Authorities Cited.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

OCTOBER TERM, A. D. 1932.

HARRY A, DAUGHERTY, Petitioner, vs. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Petition for Review of Decision of United States Board of Tax Appeals.

BRIEF FOR PETITIONER.

STATEMENT OF THE CASE.

This case is a petition for review of an order of the United States Board of Tax Appeals, redetermining petitioner's income tax liability for the year 1925. The order of the Board was entered on October 31, 1931, (Rec. p. 25), and the petition for review by this Court was filed on February 11, 1932, (Rec. p. 25), pursuant to Sections 1001-1003 of the Revenue Act of 1926.

The question is whether $47,180.28 received by petitioner's wife from third persons in 1926, pursuant to an assignment in 1924 by petitioner to her of an interest in a contract which produced the income, was income of petitioner.

The majority of the Board held that the amount was taxable income of petitioner. Two dissenting members of the Board expressed the opinion that the *res* which gave rise to

the income was assigned and that the income was not taxable to Petitioner. (Rec. p. 24).

In all years subsequent to 1915, petitioner was employed as one of the general attorneys for Standard Oil Company of Indiana, with an office in the general offices of that company. He was not engaged in the general practice of law but devoted all his time to Standard Oil Company of Indiana. (Rec. p. 16-17).

On November 1, 1923, Mr. John G. Campbell, who with his partner, Mr. Herman A. Fischer, Jr., had in 1912 been opposed to Petitioner in a matter concerning Mrs. Estelle G. Howland (Rec. p. 16), told petitioner that Mrs. Howland had a possible interest in a trust estate of John D. Jennings arising from the death of Mr. Jennings' son on October 31, 1923. (Rec. p. 17).

Petitioner told Campbell that he would ascertain the wishes of Mrs. Howland regarding the matter, but that, as stated in the Board's Findings of Fact, Rec. p. 17, "in no event could he handle litigation for her, because his position with the Standard Oil Company of Indiana occupied all of his time and attention. It was orally agreed between Campbell and petitioner that petitioner would not engage in any of the litigation, but that petitioner was simply to furnish the client." Mrs. Howland conferred with petitioner on November 3, 1923, as to which petitioner testified, Rec. p. 33:

> "I told her the situation and that 'I was not in a position to handle the litigation, could not do it on account of my connection with the Standard Oil Company, but I said: "Mr. John Campbell, who was the attorney for the Trust Company in the litigation you had before, is a very capable lawyer and so is his associate, Mr. Fischer, Herman Fischer, and men of high standing here; I have the utmost confidence in them, and if it is agreeable to you, I will have them handle the matter and I will have nothing further to do with it and they will be responsible for the litigation".' She said: 'If you have confidence in them, that is entirely satisfactory to me, and I appreciate the position you are in'."

The Findings of Fact state, Rec. p. 17:

> "At a conference between Mrs. Howland, her husband, and petitioner and Campbell at petitioner's offices in the Standard Oil Company building in Chicago, it was agreed that a bill to construe the will should be filed; that all of the work in connection with the proceedings should be performed by Messrs. Campbell and Fischer, and that there should be paid to the attorneys an amount equivalent to 40 per cent of whatever might be recovered for Mrs. Howland, this amount to be divided equally between Campbell, Fischer, petitioner, and R. J. Folonie, whose name was suggested by petitioner because of his connection with petitioner in the prior unsuccessful litigation for Mrs. Howland."

A contract between the four attorneys and Mrs. Howland was executed in quadruplicate, by which the attorneys would receive 40 per cent of any amounts recovered for Mrs. Howland.

The Findings of Fact state, Rec. p. 19:

> "It was agreed between the attorneys and Mrs. Howland that petitioner and Folonie would be required to do no work whatever in connection with the case.
>
> "(16) On November 3, Campbell and Fischer filed the bill to construe the will. There were numerous parties to the litigation and a great deal of time and effort was put on the case by Campbell and Fischer. No time whatever was put in on the case and no work of any kind was done on the case by petitioner or by Folonie, although Campbell signed petitioner's and Folonie's names to the pleadings in the litigation."

On January 30, 1924, petitioner wrote a letter to his wife, enclosing his copy of the contract on the margin of which he had executed the following assignment (Rec. p. 19):

> "Chicago, Ill., Jan. 30, 1924.
>
> "In consideration of love and affection, I hereby assign to Elizabeth M. Daugherty, my wife, an undivided one-half of my interest in and to this contract.
>
> Harry A. Daugherty."

The letter was in affectionate terms, stated what the contract related to, and also stated: "I want you to feel at liberty to use the money in any way you see fit." (Rec. p. 20-21).

The letter and contract were on January 30, 1924, delivered to petitioner's wife and thereafter always retained by her. Campbell was advised of the assignment. (Rec. p. 20).

At the time of the assignment, the litigation was pending and undetermined, "no settlement had then been arrived at and there was no assurance that the litigation would terminate successfully or that any settlement could be made. At the time of the gift the value of petitioner's interest in the contract and the value of the interest transferred by petitioner to his wife was wholly contingent and undeterminable." (Findings of Fact, Rec. p. 21).

> "In June, 1926, as a result of negotiations between the parties, in which petitioner in no way participated, a settlement of the litigation was agreed upon, * * *. Pursuant to the contract of employment, 40 per cent thereof, or $377,442.24, was duly paid to Campbell and Fischer. * * * On June 22, 1926, Campbell delivered to petitioner a check in his favor in the amount of $47,180.28 and a check in favor of Mrs. Daugherty in the amount of $47,180.28." (Findings of Fact, Rec. p. 21).

Petitioner's wife received her check, and petitioner never thereafter had the proceeds or control thereof. She did not contribute in any way to the household expenses nor did petitioner benefit in any way whatsoever from the proceeds his wife derived from the assignment. (Rec. p. 22).

The Commissioner of Internal Revenue held that the amount of the check received by Mrs. Daugherty was taxable income to the petitioner for 1926 and the majority opinion of the Board of Tax Appeals affirmed this action on the part of the Commissioner.

ERRORS RELIED UPON.

The errors assigned in the petition for review herein and upon which the petitioner relies are as follows:

"1. Upon the findings of fact made by the Board of Tax Appeals, the Board erred in not holding as a matter of law that the amount of $47,180.28 received in 1926 by the wife of petitioner was not income taxable to the petitioner.

"2. Upon the undisputed evidence presented to the Board of Tax Appeals, the Board erred in not holding as a matter of law that said amount of $47,180.28 paid to petitioner's wife in 1926 did not represent taxable income to petitioner.

"3. The Board of Tax Appeals erred in failing to find from all the evidence that the amount of $47,180.28, paid to the wife of petitioner in 1926, did not constitute taxable income to petitioner."

BRIEF OF THE ARGUMENT.

The sole question for decision in this case is whether the amount of $47,180.28, received in 1926 by Mrs. Daugherty, wife of petitioner, constitutes income taxable to the petitioner, Harry A. Daugherty. Petitioner concedes that the amount actually received by him is taxable to him, and also that the amount received by Mrs. Daugherty is taxable to her, but contends that no income tax is payable by him on the amount received by Mrs. Daugherty.

Section 213 of the Revenue Act of 1926 provides in part as follows:

> "213. * * *
>
> "(b) The term 'gross income' does not include the following items, which shall be exempt from taxation under this title:
>
> * * *
>
> "(3) The value of property acquired by gift, bequest, devise, or inheritance (but the income from such property shall be included in gross income); * * *."

This section of the statute makes it clear that when a person makes a gift of property or of an interest in property which produces income, the income from the property so assigned is taxable to the assignee and not to the assignor. When petitioner made a gift to his wife of a one-half interest in the contract in question, no income tax was payable by Mrs. Daugherty because of the receipt of the contract, as the section of the statute just quoted provides that the value of property acquired by gift does not constitute gross income. The income which she received through the contract, however, was taxable as income to her under the statute and, being taxable to her, of course, did not constitute income taxable to petitioner.

The Federal income tax laws have been drawn so as to impose a tax upon the person who receives income. When income is received by an individual as the result of his personal services, the income is taxable to him. When he receives income from property owned by him, it is taxable to him. If a person owning income producing property parts with his title to such property, the income thereafter is no longer taxable to him. If he parts with an interest in the property producing the income, he is no longer taxable upon the income received from that part of the property which he has transferred. On the other hand, if he merely makes an assignment of the income, without relinquishing title to the property producing the income, the income is still taxable to him because, as a matter of law, he is still the owner of the property producing the income. This principle runs through all of the cases which have been before the courts where the question for decision was whether income was taxable to the assignor or the assignee.

The case at bar falls within the first classification mentioned,—that is, cases where the assignor parts with an interest in the property producing income. Petitioner had an interest in a contract. This contract constituted the *res*. He assigned a one-half interest in this contract to his wife. The contract provided that under certain conditions a certain amount of money would be payable. The wife of the petitioner, two years after the assignment was made, received the sum of $47,180.28 as a result of the assignment. The contract was not one which required the performance of any services upon the part of the petitioner. The Findings of Fact of the Board state (Rec. p. 19):

> "It was agreed between the attorneys and Mrs. Howland that petitioner and Folonie would be required to do no work whatever in connection with the case."

Under these circumstances, the amount received by Mrs. Daugherty was taxable to her and not to the petitioner. This principle is laid down in a number of decided cases.

In *Copland* v. *Commissioner of Internal Revenue,* 41 Fed. (2d) 501 C. C. A. 7, Epstein, Mayer and Copland executed a written contract, by which they agreed to underwrite the sale of certain shares of the North American Oil & Refining Corporation, profits and losses to be divided equally among them. Thereafter, Copland endorsed on his copy of the contract an assignment to his wife of all of his right, title and interest therein. At that time no profits had accrued under the contract. Copland was not required to perform any services whatever in connection with the underwriting, and he performed none. When the syndicate was closed, there was a substantial profit which the syndicate manager distributed in shares to himself, Epstein and Copland's wife. The sole question in the case was whether Copland should be taxed on the sum paid to and received by his wife. The Circuit Court of Appeals reversed the Board of Tax Appeals and held that the income derived from Copland's assigned interest was taxable to his wife and not to him. The decision was specifically put on the ground that the assignor had completely divested himself of the property interest assigned. The Court emphasized that the transfer included not simply the profits but the thing that would produce the profits. The Court further stated that it was immaterial that the assignor remained liable for the syndicate losses. The Court stated:

> "It is essential to a gift *inter vivos* that it be absolute, irrevocable; that the giver part with all dominion and control over the property; that the gift go into effect at once and not at some future time; and that there be a delivery to the donee, and such change of possession as puts it out of the power of the donor to repossess himself of the property. *People* v. *Csontos,* 275 Ill. 402, 114 N. E. 123. In the instant case there were no conditions to the gift; it was absolute; it became immediately effective; there was a delivery to Mayer for the donee, and at that time it became irrevocable, and the donor was powerless thereafter to repossess himself of the corpus of the gift."

There is no basis for distinction between the case at bar and the foregoing decision.

In *Iowa Bridge Co.* v. *Commissioner of Internal Revenue,* 39 Fed. (2d) 777, C. C. A. 8, a bridge construction contract was assigned and the Court held that the income subsequently derived therefrom was taxable to the assignee but not to the assignor.

In *Nelson* v. *Ferguson,* 56 Fed. (2d) 121, C. C. A. 3, the Court held that the assignor was not taxable on the income subsequently received by the assignee, his wife, from an assigned interest in a contract. The contract provided that the assignor should receive certain profits in consideration of a transfer of a patent by him to his employer. The Court first held that the contract was property, although the amount of the profits to be derived therefrom was uncertain. The Court then held that, the contract being property, the assignor could assign his interest therein to his wife and that income subsequently derived therefrom was income of the assignee. The Court distinguished cases of other types, as follows, page 124:

> "In answering these questions it must be kept in mind that the thing assigned was not Nelson's future salary or personal earnings as in the Earl Case and in the later case of *Luce* v. *Burnet, Commissioner,* 55 F. (2d) 751, Court of Appeals of the District of Columbia, January 18, 1932, things not then in existence, 5 Corpus Juris, 87, but was an existing thing, namely: property in a contract. The assignment being of property was therefore not merely an assignment of income when earned, though from the property assigned profits and income were expected to flow. Following the reasoning in the like case of *Hall* v. *Burnet* (Court of Appeals of the District of Columbia, November 16, 1931), 54 F. (2d) 443, the assignment was not of future earnings of the assignor arising out of his future services, as in the Earl and Luce Cases, but was distinctly an assignment of a property right presently existing. Though the future income from this property right was uncertain and contingent as to

> amount, the right itself, the thing assigned, was fixed and certain—not revocable as in *Corliss* v. *Bowers*, 281 U. S. 376, 50 S. Ct. 336, 74 L. Ed. 916—and was independent of any future service or any future action on the part of the assignor. We hold it was clearly assignable to a stranger and, if so, it was, subject to the next question, assignable to the wife. Whether to a stranger or wife, we think the income from it should have been taxed to the assignee, not to the assignor who had ceased to own or control it, * * *."

In *Hall* v. *Burnet, Commissioner*, 54 Fed. (2d) 443, C. of A., D. C., Certiorari Denied by the Supreme Court of the United States, 285 U. S. 552, the Court held that where an insurance agent assigned to his wife a part of his interest in the commissions payable in the future but already earned, the assignor was not taxable on the income thereafter derived from the interest in the contract assigned to the assignee. The Court held that the assignment was of a property interest in the form of an interest in the contract, which interest produced the income in question. The assignment was absolute because the right to the income under the contract did not depend upon future personal services of the assignor. The Court of Appeals stated, page 444:

> "It was not an assignment of future earnings but the transfer of a property right, and though this property right gave rise to future income, uncertain and contingent though it might be as to amount, that fact does not destroy the distinction. In this case, the contract between appellant and the insurance company gave him a property right in all renewal premiums on all business written for the company by him or by others during the period of the contract. Undoubtedly, his right to these commissions would survive his death and would pass to his estate to the same extent and in the same way as other property which he then possessed. In these circumstances, it is obvious that the right was fixed and certain, and was independent of any future service to be rendered by him."

The four cases just cited, decided by the Circuit Courts of Appeals for the Seventh, Eighth and Third Circuits and by the Court of Appeals of the District of Columbia, respectively, present exactly the same question that is involved in the case at bar. Each of them is a case involving an absolute assignment of an interest in a contract where income was received by the assignee as a result of the assignment. In each case it was held that the income subsequently derived from the assigned interest in the contract was not the taxable income of the assignor. We do not believe that any distinction can be made between the issues presented in those cases and those presented in the case at bar.

The decision of the Board in this case was based very largely upon the decision of the Supreme Court in the case of *Lucas* v. *Earl,* 281 U. S. 111. In that case Earl and his wife in 1901 agreed that "any property either of us now has or may hereafter acquire * * * in any way, either by earnings (including salaries, fees, etc.), or any rights by contract or otherwise, during the existence of our marriage * * * shall be treated and considered and hereby is declared to be received, held, taken and owned by us as joint tenants and not otherwise, with the right of survivorship." A question arose as to whether salary and attorneys' fees earned by Earl in 1920 and 1921 were taxable to him in full or whether he was taxable only upon one-half thereof. The Supreme Court held that Earl was taxable upon the full amount received by him. The basis of the Court's decision in *Lucas* v. *Earl* is well summarized by the Circuit Court of Appeals for the Third Circuit in *Nelson* v. *Ferguson,* 56 Fed. (2d) 121, as follows:

> "That case deals exclusively with the assessment of a tax upon moneys to be received by a husband in payment for his personal services. The contract between Earl and his wife was made in 1901; the services were rendered and moneys paid in 1920 and 1921. It provided for the commingling of all the earnings of both spouses

and for holding the same as joint tenants. It dealt with future earnings, extending in that case twenty years. There was no existing thing, tangible or intangible, to which at its execution the contract could presently attach. It was therefore an executory contract based upon mutual promises in respect to things not yet in existence. One-half of the husband's earnings never could be paid to the wife unless and until earnings had accrued to him on account of things he had done, services he had rendered. Earl and his wife were anticipating the future and dealing with the potential income of each other, which, before it reached either of them, must come to and pass through the other, and in doing so it would, for an instant at least, fall under the taxing act, and this because the assignment in that case was bottomed on the fact that the earnings would come to the husband and be his property else there would have been nothing on which it could operate. This seems to be the central point of the Earl Case not only as expressed in the opinion in that case but as restated in the opinion in *Poe* v. *Sanborn,* 282 U. S. 101, 117, 51 S. Ct. 58, 75 L. Ed. 239. There the assigned income sprang from services which were not property and which of course could not be assigned. Here the income sprang from assigned property and, if validly assigned, the income was that of the assignee, the owner of the property, and was taxable as hers."

As pointed out by the Court in the *Earl* case, there was no contract to which an assignment could attach and no *res* or property which was susceptible of assignment. It was, in effect, nothing but a contract between the parties for the division of income. Under these circumstances, the money received was in the first instance the income of the party rendering the services and the arrangement between Earl and his wife was nothing more than a contract by which the husband agreed to give to his wife a share of his income after it was earned. In the case at bar, there was a contract which had value and which constituted a property right of the petitioner. This was assigned to petitioner's wife and the income derived from that interest in the contract was the income of Mrs. Daugherty.

As set out in the Findings of Fact of the Board of Tax Appeals, above quoted, the amount received by Mrs. Daugherty was not received by virtue of the performance of personal services by the petitioner, which also distinguishes the case at bar from the *Earl* case. Under the agreement, petitioner was not required to perform personal services and, in fact, he rendered none. Petitioner never received any income, constructively or otherwise. In the *Earl* case, the compensation which was paid was actually received in the first instance by Earl and the only basis for contending that it was not taxable to him was that under the agreement made with Mrs. Earl he paid one-half of it over to her after it was received by him.

There is an important distinction that should be noted between the case at bar and cases involving assignments of income to be received for personal services rendered by the assignor. In the latter cases, the assignee has no enforceable right of any kind because it is at all times within the power of the assignor to render the services or not, as he sees fit. If he does not perform the services, no income is derived and no property right assigned which can be enforced. Where the contract does not involve the performance of personal services and the assignment is of a property right, all control passes from the assignor at the time of the assignment and the assignor has no control whatever over the income thereafter earned.

Other cases of assignments of income illustrate the distinction between mere assignments of income and an assignment of an interest in the property producing the income. The case of *Bing* v. *Bowers,* 22 Fed. (2d) 450, involved a situation where there was an assignment of a given amount from the *net* rentals received by the assignor from real estate. The Court held that since the assignment was of *net* rents from which certain deductions had to be made, the income was in the first instance the property of the assignor

and taxable to him. The Court held in this case that there was no transfer to the assignee of any interest in the property itself but merely an assignment of income after it was received by the assignor. The Court concedes that if there had been a valid assignment of an interest in the property, the income would have been taxable to the assignee.

A number of cases have come before the courts involving assignments of partnership profits. In those cases where a partner simply made an assignment of profits to be earned by the partnership, the courts uniformly have held such profits taxable to the assignor, on the theory that the profits were first earned by the individual who was a member of the partnership. Of this type of case is *Luce* v. *Commissioner,* 18 B. T. A. 923, cited by the Board of Tax Appeals in its decision in the case at bar. See also *Burnet* v. *Leininger,* 52 S. Ct. Rep. 345; *Mitchel* v. *Bowers,* 15 Fed. (2d) 287; *Harris* v. *Commissioner,* 39 Fed. (2d) 546; *Cohan* v. *Commissioner,* 39 Fed. (2d) 540; *Ellis* v. *Commissioner,* 25 B. T. A. 1195. On the other hand, in those cases where there was a transfer of the partner's interest in the partnership, rather than of his distributable share of the income, the courts have held that the assigning partner is not subject to tax upon the income subsequently derived from the assigned interest in the partnership. In these cases the assignee acquires an interest in the *res* and the income therefrom is taxable to the assignee. *Commissioner* v. *Barnes Estate,* 30 Fed. (2d) 289; *Hellman* v. *United States,* 44 Fed. (2d) 83; *Crane* v. *Commissioner,* 19 B. T. A. 577.

In the case of royalties, if the assignment passes an interest in the property producing the royalties, the royalties are taxable to the assignee and not to the assignor. *Browning* v. *Commissioner,* 16 B. T. A. 485; *J. V. Leydig* v. *Commissioner,* 43 Fed. (2d) 494.

Where there is an assignment of the income of a trust by a beneficiary, the income is taxable to the assignor and

not to the assignee. Where, however, the assignment is such as to amount to a disposition of the interest of the beneficiary in the corpus of the trust estate, the income then is taxable to the assignee. *Shellabarger* v. *Commissioner,* 38 Fed. (2d) 566 (C. C. A. 7); *Commissioner* v. *Field,* 42 Fed. (2d) 820 (C. C. A. 2); *Blair* v. *Commissioner,* 18 B. T. A. 69; *Clark* v. *Commissioner,* 16 B. T. A. 453.

We know of no reported cases which impose a tax upon an assignor where he has made an absolute assignment of the *res* which produces the income. All courts which have passed on the question have held the income in such cases taxable to the assignee. This Court recognized this principle in the following language in the case of *Wehe* v. *McLaughlin, Collector,* 30 Fed. (2d) 217:

> "It may be conceded that, by a gift from one spouse to the other of his or her interest in existing community property, the entire estate is converted into the separate property of the donee, and that thereafter the income therefrom is returnable by such donee alone."

While the court was here speaking of community property, the principal involved would be the same in the case of property other than community property.

One further point should be noted. There has not been and cannot be on the record in this case any suggestion that the gift from the petitioner to his wife had any "strings" attached to it. The evidence shows that it was a bona fide gift and the proceeds received by Mrs. Daugherty therefrom were used by her alone. The Findings of Fact of the Board state (Rec. p. 22):

> "Mrs. Daugherty deposited (or caused to be deposited) this check in an account which she opened in the Illinois Merchants Trust Company, a downtown bank in Chicago. She invested the money in stocks, secured the certificates in her own name, and deposited them in her private safe deposit box. She used the dividends of the stocks entirely for her own purposes and she did not contribute in any way to the household expenses,

> nor did petitioner derive any benefit whatsoever from the money paid to his wife nor from the dividends received by Mrs. Daugherty on such securities."

At the time the assignment was made, in January, 1924, less than three months after the contract was made, the litigation was pending and undetermined. No settlement had then been arrived at and there was no assurance that the litigation would terminate successfully or that any settlement could be made. At the time of the gift, the value of petitioner's interest in the contract and the value of the interest transferred by petitioner to his wife were wholly contingent and undeterminable (Findings of Fact, Rec. p. 21).

CONCLUSION.

It is respectfully submitted that the petitioner in this case made an absolute assignment of the contract in question and divested himself of the right to receive income therefrom. The income, when received by the assignee, was the income of the assignee and not of the petitioner. Under the principles laid down in the cases which have been cited, it is respectfully submitted that the decision of the Board of Tax Appeals should be reversed.

Respectfully submitted,

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Peter L. Wentz,
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Hopkins, Sutter, Halls & DeWolfe,
Of Counsel.

No. 6856

In the United States Circuit Court of Appeals for the Ninth Circuit

HARRY A. DAUGHERTY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

UPON PETITION TO REVIEW AN ORDER OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR RESPONDENT

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SEWALL KEY,
JOHN G. REMEY,
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Of Counsel.

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CITATIONS

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 6856

HARRY A. DAUGHERTY, PETITIONER

v.

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UPON PETITION TO REVIEW AN ORDER OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR RESPONDENT

OPINION BELOW

The only previous opinion in this case is that of the Board of Tax Appeals (R. 22–24), which is reported in 24 B. T. A. 531.

JURISDICTION

This appeal involves a portion of the deficiency in income taxes asserted by the respondent for the year 1926 and is taken from an order of redetermination in the United States Board of Tax Appeals promulgated October 31, 1931. (R. 25.) The case is brought to this Court by petition for review filed February 11, 1932 (R. 25–29), pursuant to the Revenue Act of 1926, c. 27, Sections 1001, 1002, 1003, 44 Stat. 9, 109, 110.

QUESTION PRESENTED

Petitioner and others accepted a written appointment to act as attorneys in a will contest. The contract provided that they were to receive for their services a certain percentage of the amount recovered. Their client prevailed and paid the fee agreed upon. The question is whether petitioner is liable for the tax on his entire share of the fee or only on one-half thereof because of his assignment to his wife of an undivided one-half of his interest in the contract.

STATUTE INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9, 23:

> SEC. 213. * * *
>
> (a) The term "gross income" includes * * * compensation for personal service * * * of whatever kind and in whatever form paid, or from professions, * * * or * * * income derived from any source whatever. * * *

STATEMENT OF FACTS

The facts found by the Board of Tax Appeals are substantially as follows (R. 16–22):

In 1915 petitioner was employed as one of the general attorneys of the Standard Oil Company of Indiana. Prior to that time and while engaged in the general practice of law he had acted as attorney for Mrs. Estelle Howland (then Mrs. Estelle Jennings) daughter-in-law of John D. Jennings and sister-in-law of Edwin Jennings. In about 1912 petitioner and Robert J. Folonie were engaged in

litigation to establish Mrs. Howland's rights in connection with the trust estate created by John D. Jennings, who died in 1889. Petitioner and Folonie spent a great amount of time and effort on the case, which was strenuously contested, but finally the litigation terminated unsuccessfully to Estelle Howland in the Appellate Court of Illinois. Certain adverse interests were represented by the law firm of Campbell and Fischer of Chicago, of which John G. Campbell was a member.

On October 31, 1923, Edwin Jennings, the last surviving son of John D. Jennings, died. Learning of his death, Campbell called petitioner on the telephone and asked him if he still represented Mrs. Howland and petitioner stated that he did. Campbell then stated that in connection with the prior litigation he had studied and briefed the question of Mrs. Howland's rights in the trust estate and that he had reached the conclusion that in view of the death of Edwin Jennings Mrs. Howland was entitled to a substantial interest therein. Campbell offered to give this brief to petitioner. Petitioner said he would ascertain the wishes of his client with regard to the matter, but that in no event could he handle litigation for her, because his position with the Standard Oil Company of Indiana occupied all of his time and attention. It was orally agreed between Campbell and petitioner that petitioner would not engage in any of the litigation but that petitioner was simply to furnish the client.

On November 3, 1923, Mrs. Howland conferred with petitioner and informed him that she desired proceedings instituted to establish her rights in the trust estate. At a conference between Mrs. Howland, her husband, petitioner, and Campbell at petitioner's offices in the Standard Oil Company building in Chicago it was agreed that a bill to construe the will should be filed; that all of the work in connection with the proceedings should be performed by Messrs. Campbell and Fischer, and that there should be paid to the attorneys an amount equivalent to 40 per cent of whatever might be recovered for Mrs. Howland, this amount to be divided equally between Campbell, Fischer, petitioner, and R. J. Folonie, whose name was suggested by petitioner because of his connection with petitioner in the prior unsuccessful litigation for Mrs. Howland. An agreement in writing was entered into as follows:

CHICAGO, ILL., *Nov. 5, 1923.*

I hereby appoint HARRY A. DAUGHERTY, ROBERT J. FOLONIE, JOHN G. CAMPBELL, AND HERMAN A. FISCHER, Jr., to act as my solicitors and attorneys in all matters pertaining to my interest in the Trust Estate founded by the last Will of John D. Jennings, deceased. They are authorized to commence or participate in, any proceedings they deem necessary in order to establish my interest therein. As their full compensation for services they are to receive an amount equal to forty per cent (40%) of any money or property I am awarded or receive in connection with the subject matter of said

Trust Estate; it being agreed and understood that this compensation is to be in addition to any fees which may be awarded, either to me on account of my solicitors' fees, or directly to my solicitors, by any Court, from the Trust Estate as a whole, on account of legal services rendered by them in any suit or suits which they instituted or participated in involving the subject matter above mentioned, but does not include anything which I may receive directly from the estate of Edwin Jennings, deceased, as distinguished from said Trust Estate, found by the Will of John D. Jennings, deceased.

(Signed) Estelle G. Howland,
Francis H. Howland,
Hoboken, N. J.

Accepted:
Harry A. Daugherty.
Robert J. Folonie.
John G. Campbell.
Herman A. Fischer, Jr.
By H. A. Daugherty.

It was agreed between the attorneys and Mrs. Howland that petitioner and Folonie would be required to do no work whatever in connection with the case.

On November 3, Campbell and Fischer filed the bill to construe the will. There were numerous parties to the litigation and a great deal of time and effort was put on the case by Campbell and Fischer. No time whatever was put in on the case and no work of any kind was done on the case by petitioner

or by Folonie, although Campbell signed petitioner's and Folonie's names to the pleadings in the litigation.

On January 30, 1924, petitioner wrote a letter to his wife (R. 20–21), enclosing petitioner's copy of the original contract with Mrs. Howland. On the margin of such contract petitioner endorsed an assignment in longhand as follows:

> CHICAGO, ILLINOIS, *Jan. 30, 1924.*
>
> In consideration of love and affection I hereby assign to Elizabeth M. Daugherty, my wife, an undivided one-half of my interest in and to this contract.
>
> HARRY A. DAUGHERTY.

The letter and the contract with the assignment endorsed thereon were delivered by petitioner to his wife on the evening of January 30 and were retained by her in her private desk at home until requested by petitioner for use in connection with the controversy over petitioner's income tax liability. Petitioner orally advised Campbell of the assignment some time in 1925.

At the time of the gift the litigation to which the contract related was pending and undetermined. No settlement had then been arrived at and there was then no assurance that the litigation would terminate successfully or that any settlement could be made. At the time of the gift the value of petitioner's interest in the contract and the value of the interest transferred by petitioner to his wife was wholly contingent and undeterminable.

In June, 1926, as a result of negotiations between the parties, in which petitioner in no way participated, a settlement of the litigation was agreed upon, by the terms of which $943,605.60 was awarded to Mrs. Howland in satisfaction of her claim. Pursuant to the contract of employment, 40 per cent thereof, or $377,442.24, was duly paid to Campbell and Fischer. Campbell called petitioner to his office in order to figure out just what each attorney was entitled to receive. Petitioner's wife was not invited to such conference. On June 22, 1926, Campbell delivered to petitioner a check in his favor in the amount of $47,180.28 and a check in favor of Mrs. Daugherty in the amount of $47,180.28.

Mrs. Daugherty deposited (or caused to be deposited) this check in an account which she opened in the Illinois Merchants Trust Company, a down-town bank in Chicago. She invested the money in stocks, secured the certificates in her own name, and deposited them in her private safe deposit box. She used the dividends of the stocks entirely for her own purposes and she did not contribute in any way to the household expenses, nor did petitioner derive any benefit whatsoever from the money paid to his wife nor from the securities purchased therewith nor from the dividends received by Mrs. Daugherty on such securities.

Respondent included in petitioner's gross income the amount of $47,180.28 received by petitioner's

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wife. The Board affirmed the Commissioner's action and the petitioner appeals.

SUMMARY OF ARGUMENT

The income which petitioner assigned to his wife was derived from personal services. Such income is by force of the statute taxable to the one who earns it and the tax attaches before such income passes from him by a transfer to take effect in the future.

The contract of November 5, 1923, was an ordinary employment contract whereby the petitioner and other agreed to perform legal services in a will contest for a fixed consideration. After services were performed it fixed the measure of compensation. Hence, it is clear that the services rendered were the source of the income and not the contract, which merely limited the amount of the income to be received. Unless services were performed the contract created no present property right in itself productive of income, and if this is true an assignment of the contract, or any part of it, could not transfer an income-producing property right. Assuming that all services were fully performed prior to the receipt of the compensation, the assignment of the right to the compensation is ineffective "to prevent the salary when paid from vesting even for a second in the man who earned it." *Lucas* v. *Earl*, 281 U. S. 111.

ARGUMENT

An assignment of income derived from compensation for services rendered is ineffective to relieve the assignor of the tax due thereon

Petitioner relies upon the well-established rule that income is taxable to the owner of the income-producing property. He urges that the income which the Commissioner taxed to him was properly taxable to his wife since she and not he was the owner of the corpus which produced it. Petitioner argues that this corpus was the employment contract, one-half of his interest in which he had transferred to his wife. It is submitted that the income in question represented compensation received for services rendered and is taxable to the petitioner before it changes its character in the hands of another.

The controlling case is *Lucas* v. *Earl*, 281 U. S. 111. It involves an assignment making the assignee a joint tenant of salaries and fees. Earl and his wife agreed in 1911 that any property either of them had or therafter might acquire in any way (including salaries, fees, etc.) would be treated and considered as owned by both as joint tenants. The question was whether the whole of the salaries and attorneys' fees earned by Earl in 1920 and 1921 should be taxes to him or only one-half, under that portion of Section 213 (a) of the Revenue Act of 1918 (c. 18, 40 Stat. 1057, 1065), directing the inclusion in the taxpayer's gross income of "gains, profits, and income derived from salaries, wages, or compensation

for personal service." In holding the former, the Supreme Court said (pp. 114–115):

> It [this case] turns on the import and reasonable construction of the taxing act. There is no doubt that the statute could tax salaries to those who earned them and provide that the tax could not be escaped by anticipatory arrangements and contracts however skilfully devised to prevent the salary when paid from vesting even for a second in the man who earned it. That seems to us the import of the statute before us and we think that no distinction can be taken according to the motives leading to the arrangement by which the fruits are attributed to a different tree from that on which they grew.

So here we contend that the anticipatory arrangement by which the petitioner diverted his personal earnings to his wife is ineffective to relieve him of the tax imposed by Section 213 (a) of the Revenue Act of 1926 which is identical with the same provisions in the 1918 Act.

Petitioner asserts (Br. 12) that in the *Earl case* there was no contract to which an assignment could attach and no *res* or property which was susceptible of assignment while in the case at bar there was a valuable contract which was income-producing and which constituted an assignable property right of the petitioner. It is thus sought to group the contract of November 5, 1923, with such income-producing property as a lease, bond, or building, which if assigned would concededly relieve the assignor of the tax on the income

therefrom. But the analogy sought to be drawn is not applicable for the reason that the income in question was derived as compensation for the performance of services and not from the agreement of November 5, 1923. That contract of itself could produce no income unless personal services were rendered. It was an ordinary employment contract creating a relationship of attorney and client and stating the object of the employment and the rate of compensation agreed upon. Even without the contract compensation would have been forthcoming to the extent of the value of the services rendered, a fact which indicates that the income-producing source was the service and not the employment contract.

The only property right which the contract created in the petitioner was the relationship of attorney and client. This relationship is hardly susceptible of assignment, especially to a person not a member of the bar. See citation from Pollock on Contracts (4th Ed. p. 425) in *Arkansas Smelting Co.* v. *Belden Co.*, 127 U. S. 379, 388. In the hands of the present assignee it would obviously be incapable of producing income. It is plain that what was assigned was petitioner's earnings from services rendered. That such was the petitioner's intention is disclosed in the last paragraph of his letter of January 30, 1924 (R. 20–21), in which it is stated:

> If we are successful, Mrs. Howland will realize a very substantial amount, and the contingent fee will be correspondingly large.

> I am therefore assigning to you an undivided one-half interest in my share of whatever fees may be coming to me under the contract.

Petitioner stresses the fact that his associates actively conducted the litigation and not the petitioner. But the essence of an agreement such as was made here is that the joint parties sustained to each other the relationship of mutual agency. Whatever steps his associates may have taken in this litigation were in legal effect the acts of the petitioner. Mechem on Agency, Vol. I (2d Ed.), pp. 141–145; *Mason* v. *Wolkowich*, 150 Fed. 699 (C. C. A. 1st). He did in fact perform the very valuable service of furnishing his associates with a client and of providing Mrs. Howland with a firm of attorneys to conduct her litigation. He also did agree to represent Mrs. Howland as her attorney, a fact of great importance to Mrs. Howland. Petitioner agrees that the sum in question is taxable. It can be taxable only on the theory that it was compensation for services and, since such income is taxable when received, it is immaterial whether the compensation was paid for reasons other than the active participation in the suit. But even if it is assumed that petitioner rendered no further service after attaching his signature to the employment contract, the assignment did not constitute a transfer of a property right but remained an equitable assignment of future income making the wife beneficial owner with only a derivative interest in his income.

The *Earl case* does not draw any distinction between compensation paid for past services and that paid for services to be rendered. The broad language of the decision destroys any ground for such distinction. The Court held that the import and intent of the statute is to tax salaries to those who earned them and that no one can by any arrangement prevent a salary when paid from vesting in himself. Petitioner's contention if accepted would permit salaried and professional men to deflect to others compensation paid for past services and thus reduce and even avoid the payment of surtaxes.

The respondent's view is supported by further authority. In *Bishop* v. *Commissioner*, 54 F. (2d) 298 (C. C. A. 7th), an insurance agent assigned to his wife all his interest to and in one-third of all renewal commissions thereafter to become due to him under his agency contracts. The court held that the assignment was of future income and not of any present property right in itself productive of income and that the renewal commissions were therefore taxable to the agent and not to the assignee. To the same effect is *Parker* v. *Routzahn*, 56 F. (2d) 730 (C. C. A. 6th), certiorari denied, No. 134, October Term, 1932; *Luce* v. *Burnet*, 55 F. (2d) 751 (App. D. C.); *Blumenthal* v. *Commissioner*, 60 F. (2d) 715 (C. C. A. 2d). In *Reynolds* v. *McMurray*, 60 F. (2d) 843 (C. C. A. 10th), it was said that the tax is imposed by force of the statute itself immediately when the income is derived, actually or constructively, and

the tax attaches before such income passes from the recipient by a transfer to take effect in the future. In *Dickey* v. *Burnet*, 56 F. (2d) 917 (C. C. A. 8th), certiorari denied, No. 88, October Term, 1932, the court held ineffective the anticipatory arrangement by which the taxpayer diverted the deferred profits from the sale of his land to his wife and children.

Petitioner cites in support of his argument, *Hall* v. *Burnet*, 54 F. (2d) 443 (App. D. C.), certiorari denied, 285 U. S. 552. In that case the taxpayer assigned to his wife an interest in a contract with an insurance company under which he was entitled to commissions on all renewal premiums. The question was whether or not such commissions were taxable to the husband. The court held that the contract between the taxpayer and the insurance company gave him a property right in all renewal premiums on all business written for the company by him or by others during the period of the contract and that what was assigned was neither income nor earnings but a property right which is as capable of assignment as any other sort of property. It is submitted the decision is in conflict with the case of *Lucas* v. *Earl*, *supra*.

The contract between the taxpayer and the company was not the thing that produced the income; it merely afforded the opportunity for the taxpayer's personal effort, rendered pursuant to the contract, to produce the income, payment of which was deferred until the premiums were received. Apart from his services no payments would have been made either to the taxpayer or to his wife and the assignment

would not change that fact. The money paid to the wife was compensation for personal services and since the taxpayer was the one who earned it, the money even though it related to past services was his income and he would seem to be taxable for it under *Lucas* v. *Earl, supra.* The decision in the *Hall case* is directly in conflict with the *Bishop case, supra,* and though the court in the latter case distinguished the two cases the difference between them does not seem to be substantial. The effect of the two assignments was the same.

Petitioner also relies upon *Nelson* v. *Ferguson,* 56 F. (2d) 121 (C. C. A. 3d), certiorari denied 286 U. S. 565. In that case the taxpayer assigned a patent to a company under an agreement that the company was to exploit the invention and divide the profits realized, one-third to the taxpayer and two-thirds to the company. He entered into a contract with his wife waiving his rights to the profits and authorizing the company to pay them to his wife. The court held that the right to a part of the profits was a property right susceptible of assignment. The decision is in conflict with *Burnet* v. *Leininger,* 285 U. S. 136, in that the assignment was of income only and not a transfer of the patent or any interest therein or of assignor's rights in the contract. In any event the court in the *Nelson case* excluded from its decision a case involving a tax upon money to be received by a husband in payment for his personal services and pointed out (p. 125) the applicability of the *Earl case* to a situation where "the assigned income sprang

from services which were not property and which of course could not be assigned." This we submit is the situation in the present case.

The other cases cited by petitioner, such as *Copland* v. *Commissioner,* 41 F. (2d) 501 (C. C. A. 7th); *Iowa Bridge Co.* v. *Commissioner,* 39 F. (2d) 777 (C. C. A. 8th); and *Shellabarger* v. *Commissioner,* 38 F. (2d) 566 (C. C. A. 7th), are clearly not in point. In each of those cases there was an assignment of an income-producing asset and not of the income alone. This Court in *Ward* v. *Commissioner,* 58 F. (2d) 757, reviewed the cases dealing with this distinction and further discussion appears unnecessary.

The Supreme Court has denied the Government's petitions for certiorari in *Hall* v. *Burnet, supra,* and *Nelson* v. *Ferguson, supra,* and has also denied the taxpayer's petition in *Dickey* v. *Burnet, supra,* and *Parker* v. *Routzahn, supra.* Hence it appears that despite the seeming conflict in the decisions the Supreme Court considers further consideration of such questions as the one here raised unnecessary in view of the decisions in *Lucas* v. *Earl, supra,* and *Burnet* v. *Leininger, supra.*

Finally, it is not material that the income was paid direct to petitioner's wife. Profits which will constitute income if paid directly to a person are also income to him if paid, pursuant to his agreement, to a third person to discharge his obligation to such third person. *Reynolds* v. *McMurray, supra,* and cases cited therein.

CONCLUSION

The decision of the Board of Tax Appeals is correct and should be affirmed.

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NOVEMBER, 1932.

U. S. GOVERNMENT PRINTING OFFICE: 1932

No. 6862

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit 14

KILLEFER MANUFACTURING COMPANY
(a corporation),
Appellant,

vs.

DINUBA ASSOCIATES, LTD. (a corporation),
Appellee.

BRIEF FOR APPELLEE.

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No. 6862

IN THE

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DINUBA ASSOCIATES, LTD. (a corporation),

Appellee.

BRIEF FOR APPELLEE.

STATEMENT.

Appellee, plaintiff in the Court below, brought suit for infringement of patent No. 1,584,644 for a "Power Lift Implement," granted May 11, 1926, the appellee being the owner of the patent, having acquired the same through a chain of assignments from the patentee, Hugo Petzoldt.

THE PETZOLDT PATENT.

The patent sued on appears as Plaintiff's Exhibit 1. It covers an implement having a power lifting device thereon for lifting the working device on the implement into an elevated position from one of

contact with the ground on which the implement rests. The Petzoldt patent calls for a frame 1, on which a crank axle 4 is journaled transversely, there being a ground wheel 5 rotably mounted on a spindle 6 formed on each of the opposite ends of the axle 4. Each traction wheel 5 is provided with a pair of spaced discs 11 and 12 thereon, around each spindle, and the respective discs are connected by a plurality of pins or rollers 23. The discs and rollers are defined as a ratchet, generally indicated by the numeral 10. An elongated pawl 15 is pivotally mounted on each of the opposite sides of the frame 1 at a point underneath the axis of the axle 4, and said pawls normally extend forwardly alongside of the axle arms. Each pawl has a hooked end 15[a] which terminates above the pins 23 of the ratchet 10. The hooked end of the pawl is moved into contact with the ratchet by means of a manually actuated lever 25, whereby the hooked end of the pawl will engage with one of the rollers of the ratchet and as the discs rotate with the wheels, the next succeeding or following roller will disengage the hooked end of the pawl from the ratchet. The forward rotational movement of the wheels 5 is thus used, through the ratchet and pawl assembly, to raise the frame of the implement relative to the ground.

The Petzoldt patent contemplates that heavy, earth working tools, such as sub-soil plows, cultivators, road levelers, etc., would be secured to the under side of the frame, the object of the invention being to lift the earth working tool out of the ground by a par-

ticular form of power lifting device. It is this power lift device which is the subject matter of the claims of the patent in suit.

AT THE START OF THE TRIAL IN THE DISTRICT COURT, THE ATTORNEY FOR APPELLEE STATED THAT THE PETZOLDT PATENT IN SUIT WAS TO BE STRICTLY LIMITED TO THE CLAIMS THEREOF; THAT THE PLAINTIFF DID NOT SEEK A BROAD INTERPRETATION OF THE CLAIM; THAT THE CLAIM SHOULD BE STRICTLY CONSTRUED; AND THAT CLAIM 1 WAS NOT ENTITLED TO A FULL RANGE OF MECHANICAL EQUIVALENTS. (R. 54.)

Judge St. Sure, in his opinion, recognized the limited scope of the claim of the patent in suit as evidenced by the following excerpt (R. 41):

> "The patent is for a power lift device for heavy earth working tools such as sub-soil plows, cultivators, road levelers, and road building machinery. Such devices are old in the art and all of the elements are ancient. The claims are therefore narrow.
>
> Petzoldt conceived the idea of a combination for a power lift device which operated with an automatic kick-off. This feature is simple and novel, and, as the file-wrapper shows, was the inducing cause for the issuance of the patent."

THE PATENT CLAIM INFRINGED BY APPELLANT.

Claim 1, of the patent in suit, reads as follows:

> "In a power lift implement, a frame, an axle journaled transversely of said frame, an arm on each end of the axle, each arm terminating at the lower end with a spindle, traction wheels rotatable on said spindle, a pair of spaced discs mounted on one spindle and fixed to the adjacent wheel, a plurality of pins extending transversely between the discs, and at regular intervals in a circular formation adjacent the edges of the discs, an elongated pawl pivotally mounted on the frame at a point underneath the axis of the axle and normally extending forwardly alongside of the adjacent arm, said pawl having a hooked end terminating above the pins, means for swinging the pawl into an engageable position with said pins, *whereby when the hooked end is engaged with one pin and the discs rotate, the next succeeding pin will engage the pawl to disengage the hooked end.*" (Italics ours.)

Appellant has unnecessarily exerted itself to show that the description of the kick off mechanism contained in the italicized last four lines of this claim was the inducing cause for the issuance of this patent. Obviously it was. But the appellant further contends that the description of this mechanism so far modifies the preceding and unitalicized portion of the claim as to form a structure which is not to be found in the infringing device manufactured by appellant—and with this contention we join issue.

THEORY OF INFRINGEMENT.

Appellee filed this suit for infringement against the appellant, on the theory that the machines manufactured by the appellant contained every element of the claim of the Petzoldt patent owned by appellee, and that perforce the appellant's machines infringed.

The appellee urged, introduced testimony to show, and physically demonstrated, apparently to the satisfaction of the Court below, that certain machines manufactured by the appellant were identical in substance with the subject matter of the claim of the patent in suit, and that said machines would accomplish the same purpose by substantially the same means, operating in substantially the same way.

The appellee contended, introduced evidence to prove, and physically demonstrated that these certain machines manufactured by the appellant did embody the structure and follow the mode of operation recited by the last four lines of the claim in suit. The Court below found that the particular "kick-off" mechanism which was the "inducing" cause for the issuance of the patent to the appellee's patentee actually was a part of the appellant's structures.

The appellant contends that the machines which it manufactures, follow the teachings of a patent issued to one Arthur W. Hudson on April 23, 1929, appellant being the owner of said patent. Appellant admits that its machines contain all of the elements of the Petzoldt patent in suit, except that described by the following language of claim 1,

> "* * * whereby when the hooked end is engaged with one pin and the discs rotate, the next suc-

ceeding pin will engage the pawl to disengage the hooked end." (R. 42.)

Appellant contends that the machines of its manufacture do not infringe upon the claim of the Petzoldt patent because the appellant's machines are made in accordance with the teachings of the Hudson patent, and that the Hudson patent uses a "kick-off" plate for disengaging the pawl from the pins or rollers on the traction wheels.

Appellant contends that its machines do not rely upon the next succeeding pin to disengage the hooked end of the pawl from the preceding pin, when the implement has been elevated a selected distance out of the soil.

The alleged non-infringing structure used by the appellant is best described by the testimony of defendant's expert, Mr. William A. Doble, Jr. (R. 43):

> "Q. Now, in that structure as disclosed by the Hudson patent, Defendant's Exhibit 'B-4,' how are the pawls as disclosed in this patent disengaged from the ratchet wheels which are secured to the ground wheels of the implement?
>
> A. In the Hudson patent, Defendant's Exhibit 'B-4,' the pawls are disengaged from the rachet wheels by means of a stop mounted upon the actuating lever. The stop or kick-off plate is No. 60, and is most clearly seen in Fig. 4. As the implement reaches the predetermined point at which the pawl is to disengage from the ratchet wheel, the kick-off plate 60 engages the crank axle 5, holding the pawl from further movement, and thereby disengaging the pawl from the ratchet wheel."

While the expert for the appellant-defendant, stated in his testimony that the machines manufactured by the appellant-defendant do follow the teachings of the Hudson patent and do not follow the teachings of the Petzoldt patent in suit, we find the following very enlightening admission made by this expert, William A. Doble, Jr. (R. 43.)

> "The Court. Would this Hudson machine operate without the kick-off plate?
>
> "A. *Yes, your Honor.* It largely depends on the construction of the machine. In the construction of agricultural tools the manufacture is rather crude, and the adjustment plate is an important feature, because then the exact point of release can be accurately adjusted." (Italics ours.)

FIELD DEMONSTRATION BY APPELLEE.

Immediately previous to the conclusion of the trial of the cause in the lower Court, the Court and counsel proceeded to witness a field demonstration of a machine of appellant's manufacture, which demonstration was conducted by the appellee. (R. 201-202.)

The Killefer tool which the appellee demonstrated was a machine which had been manufactured and sold by the appellant-defendant. Raymond Gallagher, an individual connected with the company owning the Killefer machine in question, which is shown in the photographs marked as Plaintiff's Exhibits 7, 8, 9, 10, 11 and 12, testified that the particular machine in question had been purchased by his company on or about June the 5th, 1929, as a No. 10 Killefer

Scarifier, from the West Coast Tractor Company. (R. 173.)

Witness further testified that the serial number of the machine was 10,112, which number he had copied from one of the bills connected with the purchase of the machine in question. During the trial, when the photographs of the machine in question were offered as exhibits, Mr. Lewis E. Lyon, attorney for the appellant, made the following admission (R. 78):

> "The Court. Perhaps it might save time if you admitted that it was a Killefer tool.
>
> Mr. Lyon. *That is a Killefer tool, it has a mark on it, but when it was manufactured, or how it was constructed is another matter.* (Italics ours.)
>
> The Court. Let us save all the time we can.
>
> Mr. Lyon. I am perfectly willing to if I have an opportunity to inspect it.
>
> The Court. One of the members of your firm could tell by looking at it when it was made.
>
> Mr. Johnson. There is no doubt it was a Killefer tool, is there?"

To this, no answer was returned.

The Killefer tool shown in these photographs, Plaintiff's Exhibits 7, 8, 9, 10, 11 and 12, was without a kick-off plate or other type of camouflage mechanism for disengaging the pawl from the rollers. This same machine, about which the witness Gallagher testified, had never been in the possession of or under the control of the appellee, but appellee knowing that such a tool was located in the City and County of San Francisco, arranged to have it demonstrated to the

Court to substantiate appellee's theory of infringement.

The demonstration performed by the appellee consisted of hooking a large "Caterpillar" tractor to the draw bar of the infringing scarifier, and then pulling said scarifier about a field. The driver of the tractor operated the infringing instrument in the manner in which the implement was intended to be operated, to wit, the scarifying tool was allowed to drop so as to enter into the earth. Thereafter the pawls on the implement were engaged with rollers on the wheels of the infringing implement, and the scarifying tool was elevated out of the ground by means of the power lifting apparatus which is the subject of this controversy, *and the pawls were automatically disengaged from the rollers on the wheels by the rollers following the ones engaged by the pawls.* As the Killefer implement was being demonstrated, the Court, the attorneys, and the experts walked alongside thereof,—the rate of speed of the tractor and infringing scarifier being such that the operation of the power lift when lifting the plowing tool up out of the earth could be carefully watched. The power lift for raising the plowing tool from the earth, was operated many times during this demonstration. On every occasion the hooked end of the pawl which was engaged with the pin or roller, was disengaged therefrom by the next succeeding pin, after the plowing tool had been raised to a selected clearance above the ground. The Court very carefully observed that there was no kick-off plate on this particular Killefer implement, nor was there a kick-out device on said machine which would

disengage the pawls from the rollers on the wheels in the manner of operation described by appellant's expert witness, William A. Doble, Jr.

Upon returning to the Court after this demonstration, the following colloquy ensued (R. 202):

> "The Court. Are you ready, Mr. Johnson, to proceed?
>
> Mr. Johnson. Yes.
>
> Mr. Lyon. Your Honor, with reference to the tool which was just demonstrated, the defendant desires to have it understood that they do not admit that tool is in the present condition of its manufacture, and if your Honor desires, I have several witnesses that I can put on relative to that matter."

Undoubtedly the demonstration performed by the appellee proved to the satisfaction of the Court that the machine manufactured by the appellant contained each and all of the elements of the claim of the Petzoldt patent in suit; that it performed its operation in the same manner as that specified in the "inducing" clause of the claim of the patent in suit; and substantiated appellee's theory of the case that appellant was manufacturing a machine which was an infringement upon the claim of appellee's patent.

This test of infringement seemed to be conclusive, otherwise the attorney for appellant would not have set up the cry that the Killefer tool had been tampered with, or that the machine was not in the same condition of manufacture as that in which it had been when it left the Killefer factory. Appellant's attorney raised this same cry in the field during the demon-

stration by appellee, and the Court had ample opportunity to examine the machine and to determine if the machine had been mutilated or changed from its original form.

Appellant's attorney stated he could produce witnesses (R. 202) to testify that the machine which had been demonstrated was not in its original condition of manufacture. The appellant was free to offer these witnesses in surrebuttal, but they were never brought in. It was not the Court's province to advise the appellant whether or not the witnesses should be put on the witness stand. The offers of proof by appellant were strictly up to the appellant and not to the Court.

The position in which the appellant found itself, after witnessing a machine of its own manufacture operating in a manner constituting an infringement of the claim of the patent in suit, is explained by the following statement appearing in Appellant's Brief, page 22:

> "In inducing the District Court to believe that the Killefer implement might operate in the manner requisite to the Petzoldt patent, and which was the inducing cause for the issuance of this patent, *plaintiff demonstrated to the District Court an implement which was not a Killefer implement. The machine demonstrated by plaintiff had been reconstructed and the parts had been entirely reassembled. It was not as manufactured and sent out by the Killefer Company. An offer was made by defendant to the District Court to prove this fact, which offer was refused.*" (Italics ours.)

Tearing this last quotation to pieces, we find appellant taking the position that the machine which the appellee, plaintiff, demonstrated, was not a Killefer implement. This bald denial is made in view of the previous explicit admissions by appellant quoted above. (R. 78, 202.) What effrontery for the appellant to admit the tool which appellee demonstrated to be a tool of its manufacture, and then to flatly deny the origin of the machine in its Brief.

In the next breath, the appellant states unequivocally, "That the machine demonstrated by appellant had been reconstructed and the parts had been entirely reassembled." This statement is diametrically opposed to the truth. There is not one iota of evidence anywhere in the record to show that the machine which the appellee demonstrated was other than in its original condition of manufacture. The appellant was not denied the right to offer proof to show that the machine in question had been reconstructed or reassembled. The appellant neglected and failed to offer any evidence to substantiate its theory that the Killefer tool which had been demonstrated by appellee, had been mutilated or reconstructed, unless the conclusion expressed by Mr. Doble (R. 203) that the machine could not have worked as it did without having been "mutilated", deserves the name of evidence. Because of this failure of appellant to offer proof, the cry is raised that the appellee "framed" the demonstration with the machine of appellant's manufacture.

Further on in this same quotation from Appellant's Brief it is stated:

> "It (the machine), was not as manufactured and sent out by the Killefer Company."

Appellant admits in one breath the machine in question is a Killefer machine and in the next breath it is denied. Knowing that the Court would believe the machine in question to be a machine of the Killefer manufacture, the appellant then attempts to wiggle out of the precarious position in which it was placed, by stating that the machine in question was "not as manufactured by the Killefer Company." Yet where in the Record is there any evidence to show that the machine in question was not in the same condition as that in which it left the Killefer plant?

Finally, the appellant states that

> "It offered to prove to the District Court the fact that the machine in question was not as manufactured by the Killefer Company, which offer the Court refused."

The District Court did not refuse the appellant anything, much less any offer which the appellant claims to have made. The following excerpt from the Record speaks for itself as to whether or not the appellant made any offer such as it alleges was made in its Brief.

> "Mr. Lyon. Your Honor, with reference to the tool which was just demonstrated, the defendant desires to have it understood that they do not admit that tool is in the present condition of its manufacture, and *if your Honor desires,* I have several witnesses that I can put on relative to that matter.
>
> The Court. Have you got a new tool here?

Mr. Lyon. Yes, we have a new tool here. I have a new tool in the Killefer storeroom down there which has been inspected by the plaintiff here. We have allowed them to inspect it several times.

Mr. Johnson. Of course I could interpose other testimony by other users of these same implements that they will work precisely like the one your Honor saw, and I think we could go on, here to the end of doom, showing they work both ways." (R. 202.)

It admits of no argument that the manufacturer of a machine could not be charged with infringement of a patent where the machine had been converted into an infringing article after it left the possession of the manufacturer. The appellee is not attempting to rest its case upon such a weak premise. There has been no evidence introduced and made of record in this case tending to prove that the Killefer machine which had been demonstrated, had been misused or reconstructed.

That the structures manufactured by the appellant, Killefer Manufacturing Company, contain all of the elements of the claim of the Petzoldt patent in suit, is clearly established by plaintiff's expert, Mr. Baldwin Vale.

"My opinion with respect to the placement of the axle on the Killefer structure with reference to the corresponding placement of the axle as shown in the Petzoldt patent is that they are the same and both are pivoted above the frame. My opinion is that there is no dissimilarity between the pins that were mounted on the discs and the

respective traction wheels of the Killefer device and the Petzoldt patent, and that they are alike for the purpose of mechanics. I would describe the pins of the disc in the Killefer device as being a ratchet wheel in the common, ordinary term of a ratchet wheel, and it has a ratchet and pawl construction regardless of their particular individual characteristics. I would say that in my opinion there is no difference in the mode of operation of the device as it is constructed with reference to the Killefer Company." (R. 82.)

APPELLANT'S THEORY OF NON-INFRINGEMENT.

The question of whether or not the machines manufactured by the Killefer Company infringe upon the claim of the Petzoldt patent, depends upon whether or not the kick-off plate is indespensible to the operation of the appellant's machine. The theory of the Killefer Company is that their structures do not infringe because they manufacture machines which are supposed to include a definite element, known as a "kick-off" plate, which is supposed to disengage the pawl from the pins on the traction wheels. The Petzoldt patent specifies that one of the rollers following the one engaged by the hooked pawl will automatically disengage said pawl. The appellant confuses the issues, by laying great stress on the fact that the machines of its manufacture had either four or five pins or rollers arranged in spaced relation on the rachet wheels of its device. It is the appellant's theory that a rachet wheel having but four circumferentially spaced pins therein, could

not possibly operate in the manner called for in the claim of the Petzoldt patent and that therefore there could be no infringement. The expert witness for the appellee, Baldwin Vale stated that it did not make any difference whether the ratchet wheels had four, five, six, or seven pins therein.

> "Mr. Lyon. Q. Will you please examine these photographs which have been shown to you and tell me whether you can tell from these photographs actually whether there are four, or five, six, or seven pins in that ratchet wheel?
>
> The Court. I think he has already answered that.
>
> A. There is——
>
> The Court. You needn't answer that. It seems to me you have gone into that fully enough. Don't you think so, Mr. Lyon?
>
> Mr. Lyon. I don't know whether he has answered whether it showed five, six, or seven. I think his last answer was a qualification that he could not tell.
>
> A. *I will answer that it does not make any particular difference.*" (R. 98-99.)

The truth of this statement by the witness is kindly confirmed by the appellant itself which lays equal stress upon the alleged fact that its device follows the teaching of the Hudson patent No. 1,710,222 (Defendant's Exhibit B-4). In that patent, may it be noted, the rachet wheel which the pawl engages, has *six* pins or rollers—not four.

Appellee's expert Vale testified (R. 85) that the whole idea of the Petzoldt patent was to get the succeeding pin to kick the pawl out, and according to said

expert, it was immaterial whether or not there were four, five, six or seven pins in the ratchet wheel.

PROOF OF INFRINGEMENT.

The expert witness, Vale, examined the Killefer machine which was demonstrated to the Court and which was shown on the photographs, "Plaintiff's Exhibits 7 through 12," inclusive, and the infringing manner in which the Killefer tools operated was described by the witness as follows:

> "I have examined the structure of the lift in the device that is manufactured and sold by the defendant, Killefer Manufacturing Company, and am thoroughly familiar with the mode of operation of the lifting device as employed in the various Killefer implements. I have also examined a structure like that shown in the photograph heretofore exhibited to me. The traction wheels of the vehicle as shown by the photograph has six pins on each hub which are engaged by the lifting pawls. I saw one of the Killefer implements yesterday that had four pins on the hub. The pins I am referring to are marked on Plaintiff's Exhibit 7 by the word 'pins'; they are the pins between the two discs of the ratchet; I have examined the hooked arms that engage these pins on a number of Killefer implements, and particularly the one shown in these photographs. The mode of operation of the hooked ends of the pins, and what is accomplished thereby relative to the rest of the implement is that when the pawl is dropped the hooked end of the pawl engages the nearest pin as the wheel rotates, and as the wheel continues to

> rotate, it pulls on this hooked end of the pawl and hoists the frame of the implement, at which time the succeeding pin engages under the hook and drops it out of engagement with the one preceding it. *I did not notice in the particular structure that is shown in these photographs any means other than the rollers for disengaging the pawl from the wheels.*" (R. 79.) (Italics ours.)

Appellee does not predicate its case of infringement upon the assumption that the Killefer tool may be mutilated or reconstructed in such a way that the Killefer tools will operate so that the following roller causes the hooked pawl to be kicked off. Appellee predicates its charge of infringement upon the fact that Killefer made and sold tools which do operate in precisely the same manner as that set forth by claim 1 of the patent in suit, without the necessity of mutilating or reconstructing the tools. There is ample proof in the Record of this case, that the Killefer machines, however various, include a power lift which will operate to be disengaged by one of the following rollers on the ratchet wheel, and not through the instrumentality of any kick-off plate.

There is uncontradicted proof that the Killefer Company made and sold at least one particular tool, which was demonstrated to the Court, "Plaintiff's Exhibits 7 through 12," inclusive, and which was so constructed originally as to include a power lift mechanism in which the hooks or pawls of the lift are disengaged by the next succeeding pin of the ratchet wheel.

INFRINGEMENT BY APPELLANT NOT CAMOUFLAGED BY KICK-OFF PLATE.

The appellee introduced both as a fact and as an expert witness in farm implements, Casper Zwierlein, Jr. Zwierlein is a graduate of the College of Agriculture of the University of California, and majored in farm machinery. Since his graduation from the University of California, he has been continuously engaged in the business of selling earth working tools, having for many years been connected with the John Deere Plow Company, and between the years 1921 and 1929 inclusive, was a distributor for the Killefer Manufacturing Company's line of implements, in the San Joaquin valley. The qualifications of Zwierlein as an expert in farm machinery were not denied. (R. 58.) Zwierlein was thoroughly familiar with the construction of the entire line of Killefer tools and it was not denied that he had been one of the most successful distributors of Killefer tools in the State of California.

Bearing upon the question of the type of power lifts which were used by the Killefer Company and which were embodied in the tools of their manufacture during the period of his association with the Killefer Company, Zwierlein testified as follows:

> "The Killefer tools were equipped with this type of power lift when I commenced selling their merchandise in 1921. In this structure the chain had caused so much trouble in either breaking, stretching or getting caught around it that the chain was eliminated and then an arm was made a part of the fork casting. This change was made, I should say, about 1923, and at that time

the arm was made as a solid part of the fork to accomplish the same purpose in kicking the fork away from the ratchet.

The Killefer Manufacturing Company had the same form of lift *until the spring of 1924.* An entirely different arrangement was then adopted which consisted of hooks permanently fastened to a round shaft that was attached underneath the frame and ran crosswise, and that part was mounted in bearings so that it could oscillate, and there was an arm attached to that bar and a rope fastened to that that went to the tractor driver's seat, and when this rope was pulled the hooks were moved forward and hooked into or over a pin that was fastened to the wheel, and this particular lifting requires no grousers on the wheels so that the grousers were eliminated from the wheels, and when the rope was pulled, *the hooks would engage the pin lifting the frame out of the ground, and when the frame was sufficiently raised, the next succeeding roller in this disc would come up and kick the hook up and cause the hook to disengage from the pin.* (R. 60.) (Italics ours.)

The testimony of Zwierlein recounts with great particularity all of the changes in construction which the Killefer Company made in the power lifts which were incorporated in its tools. (R. 62.)

Zwierlein was shown the photographs of the Killefer implements, which comprise Plaintiff's Exhibits 7 through 12 inclusive, and his testimony which follows is very pertinent with respect thereto.

"In the 1924 structure a roller following the one engaged by the hook acted to disengage the

hook from the wheel when the frame was lifted, and that was not true of the structure made by the Killefer Manufacturing Company prior to 1924. The photograph handed me I would not say was on all working detail with the various sizes and depths of tools that the Killefer Manufacturing Company sold between the years of 1921 and 1929, but the design was exactly the same as used on all of them, but this photograph shows substantially the way the Killefer tools were built after the year 1924. The wheel axle in these structures is located above the frame. The axle or shaft which supports the hooked arm is located below the frame. This machine is provided with pins or rollers to engage the hooks. In this structure the next succeeding roller kicks the hook off from engagement with the wheel. I do not find any other means on this apparatus or vehicle that would serve the purpose of disengaging the hooked arms from the pins or rollers on the wheels. I have examined the particular lifting operation of this machine, or one exactly like it, on numerous occasions." (R. 63.)

It will be noted that the tools of Killefer manufacture described by Zwierlein in his testimony, are precisely the same type of tool as that set forth in the claim of the Petzoldt patent in suit. Zwierlein further testified (R. 65):

> "I sold farm implements of the character I have just described for the Killefer Manufacturing Company from 1924 until 1929."

The testimony of Zwierlein with respect to the so-called kick-off plate alleged to have been used by the

Killefer Company for disengaging the pawls from the ratchet wheels, is as follows:

> "The type of kick-off that the Killefer Manufacturing Company had on the tools during the time I was selling them was the angle bracket on the arm welded to the hook. If the kick-off plates that I have described were out of adjustment on the Killefer tools, nothing would happen at the time the wheel was tending to raise the vehicle out of the ground. *The next succeeding roller would kick out the hook arm.* The equipment brought out by Killefer Manufacturing Company in 1924 had *six* pins or rollers around the traction wheels to be engaged by the arms. The same number of pins were used throughout the remaining years up to 1929. I had seen the particular type of lifting device brought out by Killefer Manufacturing Company in 1924, because I saw practically every tool I sold. I had seen tools manufactured by others than the Killefer Manufacturing Company embodying substantially the same structure that was incorporated in the tools brought out by Killefer Manufacturing Company in 1924. The first occasion I had to see one of these tools was one of my best customers, a rancher of about 4,000 acres. I had attempted to sell them a Killefer subsoiler, having sold them a great many thousands of dollars' worth of implements previously. That was my first occasion of seeing a lift, other than Killefer used, which is the type of lift shown on this picture. This structure was exactly the same as shown in this picture here. The manufacturer, or designer, was the Dinuba Agricultural Works. They were located in Dinuba, California. To my

knowledge this business was owned by Hugo Petzoldt." (Italics ours.) (R. 67.)

The Petzoldt patent in suit was filed in the United States Patent Office on March 6th, 1923. At this time Petzoldt was connected with an organization manufacturing farm implements in Dinuba, California. It is inferrable from Zwierlein's testimony that Petzoldt built an earth working implement, including the power lift apparatus, concurrently, or nearly so, with the filing of the patent application on March 6, 1923. The testimony of Zwierlein refers to the improved type of power lift which the Killefer Company incorporated in its tools for the first time in the year 1924. Zwierlein attended a meeting of the officials of the Killefer Manufacturing Company in January of 1924, at which time the form of the power lift device then to be brought out was discussed. (R. 68.) At this meeting there was present Robert Killefer, A. W. Hudson and Robert Whyman, all officials of the Killefer Company (R. 68-69), and Zwierlein testified that he made the following statement at said meeting,

> "At this meeting I brought up the point of the lifting device and I said to Mr. Killefer, in the presence of the other gentlemen mentioned, that the power lift employed on the Killefer tools was giving so much trouble, requiring so many trips that were expensive to adjust them, and keeping the customers satisfied, that in view of the fact that a better power lift had been adapted by a company, one that the customers acknowledged was better, I said that I thought it would be a

mighty good plan to adopt something that would be equally efficient, otherwise we could not hope to retain the volume of business that we had done for the Killefer Manufacturing Company, because the competitors would naturally have the advantage of us."

Which testimony remains uncontradicted.

Following this meeting the Killefer Company came out with its improved power lift, and the circumstances attending the adoption of it were stated by Zwierlein as follows:

"In the spring of 1924, Mr. Robert Whyman telephoned me that he was coming to Stockton, and wanted me to be sure to meet him. He said that Mr. Hudson was to meet him there at my place of business. Mr. Hudson was coming from the factory at Huntington Park. Mr. Hudson appeared, and the major reason for his visit was the adoption of the power lift to take the place of the old one. Mr. Hudson told me that he had just come from Dinuba, and also from around Fresno, where Budd & Quinn—Mr. Hudson was at that time general manager of the Killefer Company—that Budd & Quinn, Killefer distributors for Fresno county, knew where various Dinuba tools were located, and had taken Mr. Hudson out to see them. Mr. Hudson told me then he was just coming from there, where he had investigated these lifts on the Dinuba implements, and had interviewed people that had used them and found them to be very satisfactory, *and he told me that it was his intention to adopt that lift on Killefer implements.* Mr. Whyman, who was also present, called attention to the fact that there was a pat-

ent covering that lift. Mr. Whyman was sales manager of the Killefer Manufacturing Company. Mr. Hudson said that he knew that there was a patent, because he had read over the patent, that Mr. Petzoldt, who was—I don't know whether he was proprietor or general manager of the Dinuba works, but anyway Mr. Petzoldt seemed to be the head man of the Dinuba works—he said that Mr. Petzoldt, or the Dinuba Agricultural Works, had been broke, had been refinanced, and they were about broke again, and he did not anticipate any trouble from that source, that they were just about on their last legs, and going out of business, and he was going to adopt that lift just as it was. I said he might be wishing trouble onto himself, and then Mr. Whyman said, 'Don't you think you had better offer Petzoldt a job at the factory, because he was a designer, and you can get him to grant you a permit to use it?' And Mr. Hudson said, 'I do not want him around, he is an erratic sort of fellow, and I do not anticipate we will have any trouble, at all.'" (Italics ours.) (R. 69-70.)

The Hudson referred to in the testimony of Zwierlein, is the same A. W. Hudson, the patentee of the Hudson patent No. 1,710,222, which was assigned by Hudson to the Killefer Company. Zwierlein named Mr. Whyman and Mr. Hudson as the individuals who had examined the Petzoldt tools in the spring of 1924, and who stated it was their intention to adopt that lift on Killefer implements. This testimony of Zwierlein as to Whyman and Hudson was not contradicted, explained or modified, nor was there any attempt made to lessen its damaging effect. Both Mr.

Hudson and Mr. Whyman are still living, and if Zwierlein's testimony had been otherwise than truthful, it was within the power of appellant to produce Whyman and Hudson, to contradict Zwierlein's testimony, if they could have done so. But neither of them was produced.

The appellant has attempted to attach some significance to the camouflage "kick-out" plate which was placed upon some of the Killefer implements. Zwierlein discussed this matter with Mr. Whyman and Mr. Abrahams, both of the Killefer Company, and following is Mr. Zwierlein's uncontradicted testimony with respect to what ensued at that conference.

> "I inquired why it was necessary to put the kick-off plates on the lift where the lift was so satisfactory without any addition. Mr. Whyman and Mr. Abrahams gave me the same instructions: 'That is only on there for looks, if you want to call it that, and if you want to, take it off or instruct the parties buying the machine to take it off because it is not necessary.' In several cases I took it off, but in most cases I left it up to the customer whether they wanted it on, because on several occasions bolts got loose and either would shift one way or the other, so that the bars would not kick off properly, and the roller was taking care of that, and it was perfectly safe without them. In most cases it was removed.
>
> Mr. Abrahams was a traveling man for the northern part of the state of Killefer Company." (R. 71.)

The Mr. Abrahams referred to by Mr. Zwierlein in his testimony, was present in San Francisco at the

time of the trial in the lower Court and yet he was not called upon to contradict the testimony of Zwierlein. Surely if Zwierlein had been untruthful, the appellant would have produced Abrahams to refute Zwierlein's testimony.

Appellant's brief is replete throughout with denials that they ever, at any time, manufactured any implements having a power lift thereon which could be remotely considered as the equivalent of the power lift called for by the claim of the Petzoldt patent in suit. The unqualified, undenied testimony of Zwierlein of record, is that during the years 1924 to 1929 inclusive, the Killefer Company did manufacture and sell implements with a power lift thereon which was a "Chinese copy" of the device specified in the claim of the Petzoldt patent. Zwierlein left the employ of the Killefer Company in the year 1929, and the following pertinent testimony of Zwierlein indicates that the Killefer Company also manufactured infringing tools *after* 1929.

> "Since 1929 I have examined Killefer tools because, being a competitor of theirs, I naturally make it my business to look over machines, and any time I have occasion to look over a machine, I look around to see if there is anything different or new on it. On the tools I have examined since 1929 practically all of them employ this, either this type of arm coming up to the kick off on this angle iron here, or when the bracket was discontinued, when they welded this arm onto the hook, that is, some of them had this extension on there, and some were without that entirely. *And at a time as recently as the spring of 1931, and specifically on the sales floor of the Killefer dealer*

in Stockton, and of the Killefer dealer in Sacramento, I saw tools just like these, without the kick-off arms on the hooks. I noticed that with one exception all of the structures had six rollers, but one machine, I think, had been cut down to four." (Italics ours.) (R. 71.)

In the Brief of Appellant (p. 23) it is stated that the elimination of the kick-off plate from the Killefer tool is not conclusive that the device will operate in the manner set forth in the claim of the Petzoldt patent in suit. The appellant argues in its Brief, that, if the actuating arm be broken off from its connection with the hooks or pawls, the mere rewelding of this arm to the connecting means of the hooks or pawls in a different position, in order to change the operation of the tool, does not convert the Killefer machine into an infringing article. Why does the appellant make this statement?

On cross-examination, appellant's expert, William A. Doble, Jr. testified as follows with respect to whether or not the Killefer tools would operate in a manner to infringe upon the Petzoldt claim:

"There is no question in my mind but what every tool manufactured by the Killefer Company disengages the pawl or hooked arm from the pin by some means located on the vehicle, other than the pins on the wheel for disengaging that pawl. I have never seen it operate in any other way. *It is possible that you could make it disengage by the next succeeding pin, but certain of these parts MIGHT have to be distorted.* It is not possible that if the kick-off plate in various of the Killefer structures was slightly out of place

that that action would result. In fact, all of the implements that I have seen and have removed the plates from, the actuating arm engaged a fixed member on the frame, which was either the transverse angle iron frame member or the crank axle to engage the actuating arm to disengage the pawl from the ratchet wheel. I have never distorted a Killefer implement to make any demonstration which would satisfy me that the hooked arm could be disengaged from the pawl purely by the action of the following pin." (Italics ours.) (R. 168, 169.)

Again appellant's expert testifies in a similar vein:

"I do not *know* that the actuating lever would engage the frame to disengage the hooked arm from the pins on the wheel because these parts have not been changed, they are just the same as in the other frame, where the other form of pawl was used." (R. 190.)

In these two instances we have the testimony of appellant's expert that he never made any test to determine if by distorting or reconstructing the Killefer tool it would operate in a manner to infringe. This expert was careful to disclaim any knowledge bearing upon the point of whether or not the Killefer tool as manufactured, would operate as the plaintiff claimed it would.

And on the other hand, it was demonstrated conclusively to the Court by practical operation, and corroborated by the testimony of Zwierlein, that the Killefer tools would operate in an infringing manner without the necessity of any reconstruction or rearrangement of parts.

It would have been very enlightening for the appellant to have learned what the results in operation would have been, had its machine been distorted or reconstructed, instead of especially manufacturing the elaborate structures, Defendant's Exhibits "C-1" through "C-19." Defendant's expert Doble also testified:

> "In other words, I would have to move the operating arm, the arm that disengages the hook from the wheel backward by bending or shifting it. I could do this with a blow-torch and some other tools, bend it back at a very nominal cost and within a very short time. *I could have done this quickly, quicker than it took to build the type of rig as I have shown in Defendant's Exhibits 'C-1' to 'C-19,'* inclusive. It did not occur to me to go to that trouble to perform that experiment. Witness was asked if he could better demonstrate the particular point of disengaging the pins from the hooked arm by making the elaborate machines shown in the photographs 'C-1' and 'C-19,' and witness replied: The structures which I built are not very elaborate. All we had to do was make a rack and put it on. They are not expensive. It was very little more expensive to build these structures than it would have been to bend the lever back a little and they are a little more illustrative of what we were endeavoring to show." (R. 152-153.)

A tool made in accordance with the claim of the Petzoldt patent and the tools made by the Killefer Company have precisely the same mode of operation.

The field demonstration performed by the appellee, and the testimony of the witness Zwierlein, and the admission made by defendant's expert (R. 43), preclude the argument that the Killefer machines had a different mode of operation from the one specified by the claim of the Petzoldt patent. In the Killefer machines, which the appellee alleges infringes, there are to be found substantially the same elements, operating in substantially the same manner, through the same mode of operation, and producing the same result. True, the mode of operation portion of the claim in suit was the "inducing" cause for the allowance of the claim to the patentee; but nevertheless, the devices manufactured by the Killefer Company employ that same mode of operation, and therefore said devices infringe upon the Petzoldt patent.

It is true that Petzoldt made no revolutionary invention. Petzoldt contributed a rather narrow improvement in a well filled art. Appellee has asked in this case for an adjudication of its rights with respect to the specific form of apparatus described in the claim in suit, believing that it has demonstrated unequivocally that the devices manufactured and sold by the Killefer Company, embody precisely the same specific form of device covered by the claim of the patent in suit.

In the case of

Bankers' Utilities Co. v. Pacific Nat. Bank, 18 F. (2d) 16,

this Court has said:

"The underlying principles of law are well understood. It is recognized that merely to assemble old elements does not constitute invention. But, upon the other hand, 'an aggregation and association of old elements may constitute invention, if it rises above mere mechanical skill and produces utility of a superior virtue to that previously attained.'

Bliss v. Spangler, 217 F. (9th C. C. A.) 394;

The Barbed Wire Patent, 143 U. S. 275, 12 S. Ct. 443, 450, 36 L. Ed. 154.

These requirements, we think, are met by the plaintiffs' device. The improvement wrought by the combination may be simple, but it is substantial and plainly useful. It is not found in the prior art, or covered by the claims in any of the references. While possibly it does not involve a high degree of inventive genius, it rises above mere mechanical skill, and exhibits a measure of patentable novelty.

Defendants show that a Gillette razor case, upon which they read the claims of the Farrington patent, No. 1,217,291, can, by certain changes or additions, be made to exhibit the essential features of plaintiffs' cover; but Gillette cases were admittedly in common use, and it remained for counsel, under the exigencies of this litigation, and with plaintiffs' commercially successful device as a model, to suggest the additions. Anticipation is not made out 'by the fact that a prior existing device, shown in a prior patent, may be easily changed so as to produce the same result as that of the device of the patent in suit where the prior device was in common use, with-

out it occurring to any one to adopt the change suggested by the patent in suit.' ''

Blake Automotive Equipment Co. v. Cross Mfg. Co. (C. C. A.), 13 F. (2d) 32.

In their position plaintiffs are fortified by the presumptions attending a patent,

Wilson & Willard Mfg. Co. v. Bole (C. C. A.), 227 F. 607;

Heinz Co. v. Cohn (C. C. A.), 207 F. 547;

San Francisco C. Co. v. Beyrle (C. C. A.), 195 F. 516,

and by the fact that their device is a commercial success and has brought on imitation.

Application of McClaire (D. C.), 16 F. (2d) 351;

Sandusky v. Brooklyn Box Toe Co. (D. C.), 13 F. (2d) 241;

Carson v. Am. Smelting Co. (C. C. A.), 4 F. (2d) 463;

Murphy Wall Bed Co. v. Rip Van Winkle Wall Bed Co. (D. C.), 295 F. 748;

Globe Knitting Works v. Segal (C. C. A.), 248 F. 495;

Morton v. Llewellyn (C. C. A.), 164 F. 697.

That the machines manufactured by the appellee have achieved commercial success is established by the testimony of Mr. Archie Block, Vice-President of Dinuba Associates, Ltd., appellee herein, who testified as follows (R. 56):

"Dinuba Steel Products Corporation sold between 100 and 150 machines under the Petzoldt

patent, and has licensed another machinery manufacturing firm under the patent on a five per cent royalty of the selling value."

"The imitation of a thing patented, by defendant, who denies invention, has often been regarded, perhaps, especially in this circuit, as conclusive evidence of what the defendant thinks of the patent, and persuasive of what the rest of the world ought to think."

Judge Hough, in the case of *Kurtz v. Belle Hat Co.* (C. C. A.), 280 F. 277, 281. Also Judge Mayer, in the case of *General Electric Co. v. Mallory* (D. C.), 294 F. 562, 564. Also Judge Coxe in the case of *David v. Harris,* 206 F. 902, 903, 124 C. C. A. 477, 478:

"The fact that the defendant is making his sweaters under a subsequent patent to Rautenberg makes the defense of lack of novelty and invention come with rather poor grace from one who is asserting that even after the complainants' patent there was still room for invention."

PETZOLDT FILE WRAPPER.

The admissions made in the File Wrapper by the patentee are binding upon him and the appellee does not seek to change, modify, or alter any of said admissions. The appellee is not attempting to explain the meaning of the claim in suit beyond the ordinary interpretation of the words used in the claim to define the invention, nor is the appellee attempting to embrace within the claim any rights which the patentee

may have waived or which may have been denied to the patentee by the Commissioner of Patents.

At the beginning of the trial, appellee stated its position clearly and unequivocally. *It was admitted that the patent claim was narrow, and it was admitted that the claim should not be broadly interpreted.*

THE CLAIMS OF THE PATENT IN SUIT ARE NOT SO LIMITED BY THE FILE HISTORY OF THE PATENT APPLICATION AS TO EXCLUDE DEFENDANT'S MACHINE FROM INFRINGEMENT.

Another of the defenses urged by the defendant is that the claims of the patent in suit are restricted by the proceedings in the Patent Office during the prosecution of the application upon which the patent was granted which, it contends, act as an estoppel to an interpretation of the claims broad enough to permit them to be read upon the defendant's machine.

THE PATENT CONTRACT.

We submit the following as essential and well settled principles of the patent law relating to the interpretation of patents:

(1)

A patent is a contract and is to be construed as such; to cover, if possible, all the novelty and invention which is contained within its "four corners."

"In construing a patent, which is a technical document, it is a primary rule that a patent, like

any other written instrument, is to be interpreted by its own terms."

Goodyear v. Davis, 102 U. S. 222; 26 Law Ed. 149.

"Liberal construction of a patent should be given in harmony with the intent and purpose of the law."

Mossberg v. Nutter, 135 F. 95;
American Brake Shoe v. Hoadley, 222 F. 327;
McMichael v. Stafford, 105 F. 380;
Ryder v. Schlichter, 126 F. 487.

"In a suit for infringement of a patent if there be a way compatible with reason and common sense to avoid a construction which declares that a patent has no claim which will protect the invention, that way should be found and followed though the claims may be capable of another construction. When forced to choose between a construction which destroys and one that saves a patent, the court should not hesitate to adopt the latter."

Gaisman v. Gallert, 105 F. 955;
Malignani v. Jasper, 180 F. 442 (C. C. A. (Mass.);
National v. Interchangeable, 106 F. 693 (45 C. C. A. 544);
Comptograph v. Universal, 142 F. 539;
Denning Wire Fence Co. v. American, 169 F. 793;
Morrison v. Sonn, 111 F. 172;
American v. Helmstatter, 129 F. 919;
Hildreth v. Mastoras, 253 F. 69, aff. 257 U. S. 27; 66 Law Ed. 112.

(2)

An inventor may claim the specific construction illustrated in his patent and also have a general broad claim and when this is done, in order to sustain the broader claim, it is not necessary that he should point out in his patent that the specific construction shown is not essential to the invention.

The case of *Ryder v. Townsend,* 188 F. 792, is a case in point. In that case the patentee in his first, second and third claims claimed specific devices in combination and in his fourth claim he claimed the combination in general, not limited to the specific thing pointed out in the specification. The Court says:

> "This last claim, in question here, is not limited in terms to any specific form of brace, or door, or reinforce, and for the court to do so would be rewriting the claim and importing into it limitations not found in the claim itself *and certainly not imposed by any action of the Patent Office* or by the prior art."

(3)

In construing a claim one must have in mind the nature of the patent, its character as a pioneer invention or otherwise and the state of the art at the time the invention was made.

Cimiotti v. American, 189 U. S. 406; 49 Law Ed. 1104;

Letson v. Alaska, 139 F. 129;

Roberts v. Bruckman, 266 F. 986;

Bruckman v. Denaro, 297 F. 913.

(4)

A claim of a patent which is met in terms only is not necessarily invalid.

"The principle of the invention will be taken into consideration."

New England Motor v. Sturtevant, 140 F. 866.

(5)

A claim in a patent, when not ambiguous, is to be construed according to the meaning of its own terms in the light of the specification and drawings only and the file wrapper cannot be resorted to to vary the language of the claim.

"Undoubtedly, a patent, like any other written instrument, should be interpreted by its own terms."

Goodyear v. Davis, 102 U. S. 222; 26 Law Ed. 149;

Fullerton v. Anderson-Barngrover, 166 F. 443.

The file wrapper of a patent may be resorted to to confirm a particular construction which the patent bears on its face.

"But when a patent bears on its face a particular construction inasmuch as the specification and claims are in the words of the patentee, it is reasonable to hold that such a construction may be confirmed by what the patentee said when he was making his application. The understanding of a party to a contract has always been regarded as of some importance in its interpretation."

Goodyear v. Davis, 102 U. S. 222.

(6)

The File Wrapper of a patent may be examined to determine the question of estoppel through rejected claims and if a patentee acquiesces in the rejection of his claims on references cited in the Patent Office and accepts a patent on an amended claim or a substituted claim, he is thereby estopped from maintaining that the amended or substituted claim covers the devices or combinations shown in the references, and from successfully claiming that the amended or sub-

stituted claim has the breadth of the claims that were rejected. This, however, is the limit of the estoppel and the patentee is not estopped from claiming and securing by an amended or other claim, every improvement he has in fact invented that was not disclosed by the references on which his original claim was rejected.

"The court examines the file wrapper of a patent only to determine the question of estoppel through rejected claims."

Spalding v. Wanamaker, 256 F. 530 (C. C. A., Second Cir.);

Batlzley v. Spengler, 262 F. 423 (C. C. A., Second Cir.);

Boyer v. Keller, 127 F. 130 (Third Cir.);

McCormick v. Medusa, 222 F. 288 (C. C. A., Seventh Cir.).

"Arguments and explanations in support of an application for a patent, to make clear the true nature and merits of the invention, and amendments to emphasize them, are not to be construed as limitations on the claims of the patent as allowed."

McCormick v. Medusa, 222 F. 288 (C. C. A. Seventh Cir.).

See also:

Daylight v. Marcus, 110 F. 980;

Dodge v. Jones, 153 F. 186;

Pangborn v. Sly, 284 F. 220;

Rembert v. American, 129 F. 355;

National v. Spang, 135 F. 351;

Webber Electric v. Freeman, 256 U. S. 668; 65 Law Ed. 1162;
Tomson-Houston v. Wagner, 119 F. 178;
U. S. Peg Wood v. Sturtevant, 122 F. 479;
Safety Oiler Co. v. Scovill, 110 F. 203;
General Fire Extinguisher Co. v. Mallers, 110 F. 529; 49 C. C. A. 139;
Piefer v. Brown, 112 F. 435; 50 C. C. A. 331;
U. S. Peg Wood v. Sturtevant, 125 F. 382; 60 C. C. A. 248;
Hess-Bright Mfg. Co. v. Fitchel, 219 F. 723;
Veneer Machinery Co. v. Grand Rapids Chair Co., 227 F. 419;
Stromberg v. Zenith and Zenith v. Stromberg, 254 F. 68, C. C. A., Seventh Cir.;
St. Louis v. American, 156 F. 574;
Haskell v. Perfect, 143 F. 128;
Seegar v. American, 171 F. 416;
Sharp and Smith v. Physicians, 174 F. 424;
Haywood v. Syracuse, 152 F. 458;
Valvona v. Marchiony & Valvona, 207 F. 380.

PATENTS ALLEGED TO ANTICIPATE.

The prior art patents relied upon by the appellant to anticipate the Petzoldt patent, are as follows:

1. Wilson patent, # 185,612, Defendant's Exhibit "B-13";
2. Beckwith " # 301,081, " " "B- 2";
3. Mader " #1,543,116, " " "B- 6";
4. Rupprecht " #1,361,906, " " "B- 7";
5. Hudson " #1,710,222, " " "B- 4".

Wilson patent.

The Wilson patent is an ordinary form of horse drawn hay rake, utilizing a ratchet wheel E, in combination with a system of pawls N, for lifting the hay rake G, upwardly at intermittent intervals. The claim of the Petzoldt patent in suit is not to be found element for element in the Wilson patent, operating in the same manner to produce the same result. The primary object of the Petzoldt patent is to lift the frame with the plowing tool on it, out of the ground. In the Wilson patent the frame C is fixed to a cross axle, and the frame is never moved, either upwardly or downwardly, by the action of the pawls engaging the ratchet wheel. But even if, in the Petzoldt device, the plowing tool were swung up out of the ground, independently of any movement of the frame, a device would not be formed comparable to the disclosure of Wilson. It is one matter to swing the light tines of the rake of the Wilson patent, and another thing to elevate the plowing tool of the Petzoldt patent. The resistance created by drawing the plowing tool through the soil in the Petzoldt device, is transmitted directly from the plowing tool to the frame on which the tool is mounted, and thence to the tractor pulling said implement. When the plowing tool is elevated out of the ground, the pulling force of the tractor is still transmitted to the frame. The Petzoldt patent requires that the frame of the implement and the plowing tool be a rigidly connected unit, and that every lifting movement of the plowing tool be accomplished through a power lift interposed between the frame and the tractor wheels. It is an entirely unjustifiable

assumption that the Petzoldt plowing implement could be substituted in the Wilson structure in place of the hay rake.

Appellant admits that the Killefer structure follows the teachings of the Hudson patent No. 1,710,-222, which was granted on April 23, 1929, and by a process of reasoning unknown to the appellee, assumes that the Killefer structure is not anticipated by the Wilson patent, although appellant argues the Wilson patent should anticipate the structure claimed by the appellee in the Petzoldt patent.

The testimony of defendant's expert witness, Doble, on this point is very enlightening.

> "The tools manufactured by Killefer Company which embody the features of the Hudson patent are the Killefer subsoil plows, Killefer chisels and rippers.
>
> The structure as disclosed in the Wilson patent is closer to the structure of the Petzoldt patent than to the Killefer type of structure. *The Killefer structure is closer to the Petzoldt than it is to the Wilson patent.*" (Italics ours.) (R. 169-170.)

It is important to note that in the opinion of defendant's expert, Doble, the Killefer structure is closer to Petzoldt than it is to the Wilson patent. On cross-examination, the expert Doble, testified that in the Wilson patent he did not find any of the essential parts specified in the claim of the Petzoldt patent:

> 1. No axle journaled transversely of the frame;

2. No arm on each axle terminating at the lower end with a spindle;

3. No traction wheels rotatable on the spindle;

4. No pair of discs mounted on one spindle and fixed to the adjacent wheel;

5. No ratchet wheel in the Wilson patent like in Petzoldt;

6. No pins in the ratchet wheel;

and the expert, Doble, succintly defines the pertinency of the Wilson patent to the Petzoldt structure by the following statement:

> *"All of the elements of the Petzoldt claims are not found in the Wilson patent, not in their specific forms, but in a general combination."* (R. 171.)

Beckwith patent.

The Beckwith patent discloses a wheeled road scraper and illustrates a device which has absolutely no similarity either in appearance, or in operation, or in structure, to the tool described in the Petzoldt patent. The one thing which the Beckwith patent does show, is a pair of discs on each tractor wheel connected by circumferentially spaced pins. Other than this one point in common, there is no similarity or likeness between the Petzoldt and Beckwith structures. In the Beckwith patent, the object of the invention is to accumulate a scraper full of dirt and then by means of the ratchet lifting mechanism on the wheels, to elevate the scraper into a position where the contents of the scraper will be dumped out.

It is interesting to note how the defendant's expert, Doble, contrasted the tool made by the Killefer Company with the tool shown in Petzoldt's patent, and the tool shown in the Beckwith patent:

> "Mr. Doble, I will call your attention to this Beckwith patent, Defendant's Exhibit 'B-2,' and I want to know whether the type of power lift used by the Killefer Company and the complete structure, plow structure or structure manufactured by the Killefer Company, bear a closer resemblance to the form of device shown in the Beckwith patent or to the form of device shown in the Petzoldt patent? * * *
>
> A. It more closely resembles the Petzoldt patent, but still it is of a different type than either of the other two." (R. 177-178.)

On cross-examination, defendant's expert, Doble, also testified that the scraper box E of the Beckwith patent was, in his opinion, the equivalent of the frame of the Petzoldt patent, and that it is the "body" of the machine. (R. 179.) Now, the Petzoldt patent definitely shows a "body" on which a plowing tool is mounted, and it would be possible to remove the plowing tool from the "body" without in anywise affecting the action of the power lift in elevating the "body" relative to the ground. If the scraper box E of the Beckwith patent is the "body" of that machine, as the expert Doble says it is, then if said scraper box were removed from the implement, it would not be an operative machine at all. The racks in the Beckwith patent assume positions entirely different in operation from those of the pawls in the Petzoldt patent,

and the racks in the Beckwith patent cause the scraper box to go through certain convolutions which it would be impossible to achieve with the pawls of the Petzoldt patent.

The defendant's expert, Doble, contends that the Beckwith patent shows a structure which is the same as the Petzoldt tool, and yet the following testimony of the expert states many reasons why the tools shown by the Beckwith and Petzoldt patents are entirely different.

> "The frame in the Petzoldt patent never assumes the inverted position shown by the scraper pictured in the Beckwith patent because the Beckwith patent is a power lift applied to a different type of implement. It would not be possible or desirable in the Petzoldt patent to raise the frame to the inverted position shown by the Beckwith patent, *and it would not be mechanically possible to do it without changing the frame.* You could not do it in the construction of the Petzoldt device as shown in the Patent, which is merely the application of a power lift to a different form of earth-working tool, such as called for in the Petzoldt patent." (Italics ours.) (R. 180.)

Mader patent.

The Mader patent discloses a power lift on an agricultural implement. The elements set forth in the claim of the patent in suit cannot be found in the Mader patent. The arrangement of the axle specified in the Petzoldt claim is essentially different from the axle arrangement shown in the Mader patent. The

pawls of the Petzoldt patent are mounted on a shaft in a predetermined location relative to the axle, and neither the pawls nor the arrangement thereof is to be found in the Mader patent. The type of pawl claimed in the Petzoldt patent is entirely different from the toothed rack or lifting arm 40 shown in the Mader patent.

It is important to note that the Mader application and the Petzoldt application were copending in the Patent Office at the same time. The Petzoldt patent having been filed in the Patent Office about six months after the Mader application, and the Petzoldt patent issued about ten months after the Mader patent. For a period of about two years and three months, the Mader and Petzoldt applications were copending, and yet there was no interference declared between the respective applications. If Mader had attempted to claim that which Petzoldt was seeking to claim, or vice versa, there would have been an immediate conflict between the respective applications and the Patent Office would have determined who was the inventor of the matter in dispute. The appellee is not attempting to assert that the claim of the Petzoldt patent is of such scope as to dominate a structure made in accordance with the Mader patent. The Mader patent preceded the Petzoldt patent, and Mader is at perfect liberty to make and sell his structure without any interference from the Petzoldt patent.

The Mader patent has no transverse axle with arms at each end thereof terminating at the lower end

with a spindle, and with a traction wheel rotable on each spindle, as called for by the Petzoldt claim. Furthermore, the Mader patent does not have any elongated pawl pivotally mounted on the frame underneath the axis of the axle. Instead the Mader patent has a toothed rack attached to the frame above the level thereof. Killefer has adopted the axle construction of Petzoldt and not the axle construction of Mader. Killefer has also adopted the pawl structure of Petzoldt, and not the rack structure of Mader. The pawl of Petzoldt could not be placed on the Mader tool in lieu of the rack shown therein, to form an operative structure. Killefer has borrowed nothing from the Mader patent but has bodily appropriated the Petzoldt structure.

Rupprecht patent.

The Rupprecht patent No. 1,361,906 discloses a cultivator having a power lift device thereon. The construction of the Rupprecht tool, and particularly the power lift mechanism, is specifically different from the power lift mechanism set forth in the claim of Petzoldt. Once again the appellee is not attempting to assert that the claim of the Petzoldt patent covers such a structure as that shown by Rupprecht, nor does the Rupprecht patent anticipate the structure which the appellee has embodied in his claim. The Rupprecht patent discloses a rack form of a lift bar 32 which is entirely different from the pawl type of mechanism specified in the Petzoldt patent. The Rupprecht and Mader patents cover very similar

power lift mechanisms, both being of a different type from the one claimed in the Petzoldt patent. The structure specified in appellee's claim, is not to be found, element for element, in the Rupprecht patent, and hence the mode of operation of the device shown by Rupprecht is different from that specified in the Petzoldt patent.

It is true that the Rupprecht patent and the Mader patent describe how to accomplish the raising of a plowing implement out of the ground through rack bars on the frame cooperating with ratchets on the tractor wheels of the vehicle, but the means specified are not the same as those specified by Pezoldt in the claim of the patent in suit.

Neither the Rupprecht nor the Mader patents were cited against the Petzoldt application during its prosecution through the Patent Office. It is to be assumed that the Patent Office knew of these patents, and if they had been considered pertinent to the structure claimed by Petzoldt, they would have been cited as anticipatory thereof.

Killefer has borrowed nothing from the Rupprecht patent but has borrowed the gist of the Petzoldt invention, otherwise the appellant would not have attempted to excuse and apologize for the action of the Patent Office (page 39, Appellant's Brief), where no excuse or apology was necessary.

The District Court was correct in its judgment of the prior patents introduced in evidence, in stating

that none of them performed the same function in the same way as the Petzoldt device. (R. 45.)

> "Prior structures, which by modification might be made to perform functions of one later patented, are not anticipations, where not designed, adapted to, nor used for such functions,
>
> Tashjian v. Forderer Cornice Works, 14 Fed. (2d) 414;
>
> Topliff v. Topliff, 145 U. S. 156;
>
> Los Alamitos v. Carroll, 173 Fed. 280."

Appellant's theory of the Petzoldt patent as it might be affected by the prior patents in the analogous art, is that it could not possibly be valid, because it is a combination of elements, every one of which is ancient and notoriously old. To advance appellant's theory further would be tantamount to holding that no new patents should be issued. The appellant knows that the appellee is not attempting to assert that the claim of the Petzoldt patent covers all types of power lift implements which preceded it. The Petzoldt patent has claims which are narrow and specific. The Petzoldt patent has carved out a very small niche in the art of which it is a part, and the Killefer structures are not entitled to occupy Petzoldt's niche without paying tribute therefor.

The form of power lift mechanism device shown by Petzoldt is not shown or described in the Beckwith, Wilson, Mader or Rupprecht patents. Those patents do show power lift mechanisms for elevating an earth working tool out of the ground. Petzoldt

has claimed his particular form of power lift mechanism in definite and specific terms and the power lift described by Petzoldt is not to be found in any of the prior patents relied upon by the appellant. The appellee concedes that there are many power lift devices patented previous to Petzoldt, all of which will accomplish the raising of an earth working tool from the ground, but maintains that none of these prior patents show the same elements, or follows the same mode of operation as that specified by Petzoldt. The appellee does not claim to have any patent on a mode of operation covering the lifting apparatus. Appellee maintains that the Petzoldt patent describes a peculiar combination of elements, put together in a certain way to function in a particular manner, and that the same combination of elements, operating in the same way to produce the same result, is not found in the prior patents, but is found in the Killefer structure.

Hudson patent.

The Hudson patent No. 1,710,222, is relied upon by the appellant with great stress. The Hudson patent was filed in the Patent Office about nine months after the filing of the Petzoldt patent, and the Hudson patent did not issue until approximately three years after the issuance of the Petzoldt patent. Both of these applications were copending for about two years and four months, and yet there was no interference declared between the two applications. The Petzoldt patent being earlier than the Hudson

patent, anticipates it. This rule is clearly established by the Supreme Court of the United States in

Milburn Co. v. David-Bournonville Co., 70 Law Ed. 651,

the decision in which is summarized in the head note as follows:

> "A description in an application for a patent of a thing claimed in a subsequent application by another, filed before the patent is issued, is a disclosure which, in the absence of evidence carrying the invention of the second claimant further back, prevents issuance of patent to the second claimant, although it was not claimed in the first application."

As between copending applications, respective filing dates fix respective dates of invention in absence of other evidence. (*Fleischmann Yeast Co. v. Federal Yeast Corporation,* 8 F. (2d) 186, 201.) The grant of a later patent is evidence only that a patentable difference exists between the device shown and that of a prior patent, and not that it does not infringe the earlier patent. (*Herman v. Youngstown Mfg. Co.,* 191 Fed. 579.)

The Court below apparently drew the inference from the testimony of appellant's expert Doble, that the Killefer tools bore a closer resemblance to the Petzoldt patent than to any other patent of record.

> "Mr. Doble, I will call your attention to this Beckwith patent, Defendant's Exhibit 'B-2,' and I want to know whether the type of power lift used by the Killefer Company and the complete structure, plow structure or structure manu-

factured by the Killefer Company, bear a closer resemblance to the form of device shown in the Beckwith patent or to the form of device shown in the Petzoldt patent?

The Court. You have already gone over that.

Mr. Johnson. That was with another patent.

The Court. Didn't you ask him the general question whether or not the implement made by the Killefer Company did not more closely resemble the Petzoldt patent than any other?

Mr. Johnson. I probably did. I did not understand that the question would have that scope in your Honor's mind.

The Court. Let me have the patents, Mr. Clerk.

A. *It more closely resembles the Petzoldt patent, but still it is of a different type than either of the other two.*" (Italics ours.) (R. 177-178.)

Appellee's expert Baldwin Vale, testified that none of the prior art patents anticipated, nor disclosed structures similar to the Petzoldt device, as follows:

"I have examined all of the prior art patents that the defendant has set up in its answer, and also those which they have relied upon and have introduced here in evidence. I will say that the Killefer structure bears a closer resemblance to the Petzoldt patent than to any other patent to be found in the prior art that has been introduced here in evidence. In my opinion the power lifting apparatus embodied in the Killefer tools involves all of the elements set forth in claim 1 of the Petzoldt patent, and *it is of course obvious in an art as closely crowded as this has obviously been since the seventies, that there are going to*

be individual elements borrowed from the prior art in any construction that would be built along these lines, but apparently Killefer has followed the teachings of Petzoldt.

There is no patent in the prior art which I have examined which, so to speak, is a Chinese copy of the Killefer construction as it is manufactured at present, but I would say that the Killefer construction is a Chinese copy of the construction shown in the Petzoldt patent. I find every element of claim 1 of the Petzoldt patent in the Killefer construction." (Italics ours.) (R. 201.)

Whether or not the device patented by Petzoldt arises to the dignity of invention, is a point which the Patent Office has already passed upon in the grant of the patent to Petzoldt, and the Petzoldt patent no more covers "trivial" matter than does the Hudson patent or any of the other patents owned by the appellant.

The Killefer Company also owns such patents as the Thayer patent No. 1,505,679; Towner patent No. 1,452,855; and Watters patent No. 1,487,413, all of which were patented ahead of the Petzoldt patent, and all of which patents cover power lifts for ground working implements. All of these patents disclose structures which the Killefer Company could utilize to avoid infringement of the Petzoldt patent.

Undoubtedly the Killefer Company has seen fit not to adopt the power lifts disclosed by the patents which it owns for the reason that the Petzoldt structure is much simpler to operate, cheaper to manu-

facture, and more efficient in operation. The Killefer Company had the entire patent art on power lift implements at its command when it sought to adopt a power lift structure, and there is no just reason why they should be allowed to boldly copy that of Petzoldt.

In the case of *Bankers' Utilities Co. v. Pacific Nat. Bank,* 32 F. (2d) 105, this Court has said:

> "In section 359 of Walker on Patents (5th Ed.), the learned author says: 'Primary inventions are entitled to a somewhat looser application of this definition of an equivalent than those inventions which are secondary. But a patentee is not to be denied the benefit of the doctrine of equivalents to the extent necessary to protect his actual invention, although the invention may be a narrow one. A fair statement of the rule is that "the range of equivalents covered by the patent corresponds with the character of the invention, and includes all forms which embody the substance of the invention, and by like mechanical cooperation effect substantially the same result." ' "

And in *Butler v. Burch Plow Co.,* 23 F. (2d) 15, we said:

> "Unquestionably there is some difference in the structure of the machines, but we think there is no difference in principle. We look more to the substance of things than their forms.
>
> 'Where a combination patent marks a distinct advance in the art to which it relates, as does the appellant's invention here, the term "mechanical equivalent" should have a reasonably

broad and generous interpretation, and protection against the use of mechanical equivalents in a combination patent is governed by the same rules as patents for other inventions.

Imhaeuser v. Buerk, 101 U. S. 647, 25 L. Ed. 945' * * *

Defendants therefore cannot escape infringement by adding to or taking from the patented device by changing its form or even by making it somewhat more or less efficient, while they retain its principle and mode of operation and attain its results by the use of the same or equivalent mechanical means.

Louire v. Lenhart, 130 F. 122, 64 C. C. A. 456."

Whether by the slight changes defendant's device is rendered less attractive or more attractive to the public we need not determine. It is sufficient to say that it embodies plaintiff's invention.

This Court also held to a similar view in the case of *Butler v. Burch Plow Co.,* 23 F. (2d) 15.

"Appellants insist that the three patents in suit are invalid, in view of the prior art. The Circuit Court of Appeals for the Second Circuit has said that the principal question in cases of this character is:

'Has the patentee added anything of value to the sum of human knowledge? Has he made the world's work easier, cheaper and safer? Would the return to the prior art be retrogression? When the court has answered this question, or these questions, in the affirmative, the effort

should be to give the inventor the just reward of the contribution he has made.

The effort should increase in proportion as the contribution is valuable. When the court has to deal with a device which has achieved undisputed success and accomplishes a result never attained before, which is new, useful, and in large demand, it is generally safe to conclude that the man who made it is an inventor. The court may resort to strict, and it may even be to harsh, construction, when the patentee has done nothing more than make a trivial improvement upon a well-known structure which produces no new result; but it should be correspondingly liberal when convinced that the patentee's improvement is so radical as to put the old methods out of action. The courts have frequently held that one who takes an old machine, and by a few even inconsequential changes compels it to perform a new function, and do important work which no one before ever dreamed it capable of performing, is entitled to rank as an inventor.'

O'Rourke Engineering Const. Co. v. Mullen (C. C. A.), 160 F. 933, 938.

'The keynote of all the decisions is the extent of the benefit conferred upon mankind. Where the court has determined that this benefit is valuable and extensive, it will, we think, be difficult to find a well-considered case where the patent has been overthrown on the ground of nonpatentability.'

O'Rourke Engineering Const. Co. v. Mullen, supra.

In the same case the court quotes from Hobbs v. Beach, 180 U. S. 383, 392, 21 S. Ct. 409, 413 (45 L. Ed. 586) as follows:

'* * * While none of the elements of the Beach patent,—taken separately, or perhaps even in a somewhat similar combination—was new, their adaption to this new use and the minor changes required for that purpose resulted in the establishment of practically a new industry, and was a decided step in advance of any that had theretofore been made.

'In administering the patent law, the court first looks into the art to find what the real merit of the alleged discovery or invention is, and whether it has advanced the art substantially. If it has done so, then the court is liberal in its construction of the patent to secure to the inventor the reward he deserves. If what he has done works only a slight step forward, and that which he says is a discovery is on the border line between mere mechanical change and real invention, then his patent, if sustained, will be given a narrow scope, and infringement will be found only in approximate copies of the new device. It is this differing attitude of the courts toward genuine discoveries and slight improvements that reconciles the sometimes apparently conflicting instances of construing specifications and the finding of equivalents in alleged infringements. In the case before us, for the reasons we have already reviewed, we think that Eibel made a very useful discovery, which has substantially advanced the art. His was not a pioneer patent, creating a new art; but a patent which is only an improve-

ment of an old machine may be very meritorious and entitled to liberal treatment.'

Eibel Co. v. Paper Co., 261 U. S. 45, 63, 43 S. Ct. 322, 328 (67 L. Ed. 523).

'The defendant claimed that the complainant's device was anticipated by the prior art. To authorize the allowance of a patent, there must be a substantial difference in principle from prior inventions. To amount to anticipation it is essential that there should be identity in substance, and the two things must accomplish the same purpose by substantially the same means, operating in substantially the same way. And a patentee's claim to an invention is anticipated when it appears that another made the invention before the date when the patentee made it. The anticipation may consist of prior patents or publications. And if prior invention is shown to have existed and been in use, it is clearly of no consequence whether it was patented or not. In the case at bar our attention has been called to a number of prior patents which defendant alleges show that the complainant's device was anticipated. But an examination of the patents referred to convinces us that there is absolutely nothing in the claim of anticipation by the prior art. The prior patents do not disclose or in any way suggest the invention of the patent in suit.'

Boyce v. Stewart-Warner Speedometer Corporation (C. C. A.), 220 F. 118, 124."

CONCLUSION.

Appellee therefore contends plaintiff's patent in suit has been infringed by the devices made by the defendant; that the claim of the patent in suit reads perfectly upon defendant's structure; that the tools manufactured by defendant have all of the necessary elements, and operate and function in a fashion exactly in accordance with the claim of plaintiff's patent; and that the attempt on the part of defendant to show that by the prior art, plaintiff's patent was anticipated, has failed.

Dated, San Francisco,
January 20, 1933.

Respectfully submitted,
LINCOLN V. JOHNSON,
C. HUNTINGTON JACOBS,
ARTHUR P. SHAPRO,
Attorneys for Appellee.

No. 6833

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit

CHARLES E. DYER, Administrator of the Estate of Omey E. Dyer, Deceased, and CHARLES E. DYER, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

Transcript of the Record

Upon Appeal from the United States District Court for the District of Idaho, Eastern Division.

STRAWN & CO., INC., PRINTERS, BOISE, IDAHO

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit

CHARLES E. DYER, Administrator of the Estate of Omey E. Dyer, Deceased, and CHARLES E. DYER, *Appellant*,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of the Record

Upon Appeal from the United States District Court for the District of Idaho, Eastern Division.

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

JESS B. HAWLEY,
OSCAR W. WORTHWINE,
BOISE, IDAHO;

EARL W. COREY,
BLACKFOOT, IDAHO,

Attorneys for Appellant.

H. E. RAY,
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W. H. LANGROISE,
Assistant U. S. District Attorney;

SAM S. GRIFFIN,
Assistant U. S. District Attorney;

RALPH R. BRESHEARS,
Assistant U. S. District Attorney;

Q. A. QUIGLEY,
Insurance Attorney, U. S. Veterans' Bureau,

Attorneys for Appellee.

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IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

CHARLES E. DYER, Administrator of the Estate of Omey E. Dyer, Deceased, and CHARLES E. DYER, *Appellant,*

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 801

COMPLAINT

Filed Sept. 1, 1931

Comes now, the plaintiff in the above entitled action and complaining of the defendant alleges as follows, to-wit:

I.

That the plaintiff herein is now a resident and citizen of Blackfoot, County of Bingham, State of Idaho, in the Eastern Division of the District of Idaho.

II.

That Charles E. Dyer is the duly appointed, quali-

fied and acting Administrator of the Estate of Omey E. Dyer, deceased; that he is the father of Omey E. Dyer, deceased, and was named as beneficiary in the war risk insurance policy hereinafter referred to.

III.

That this action is brought under the War Risk Insurance Act of October 6, 1917, and the World War Veterans Act of June 7, 1924, and amendatory acts, and is based upon a policy or certificate of insurance issued under said acts to Omey E. Dyer by the defendant.

IV.

That on the 5th day of August, 1918, Omey E. Dyer enlisted for military service in the United States Army and served as a member of said United States Army contiuously until he was honorably discharged from said United States Army on the 25th day of April, 1919.

V.

That while in the said United States Army, and during the period between his said enlistment, and his honorable discharge as aforesaid, Omey E. Dyer desiring to be insured against the risks of war, and on or about August, 1918, applied for a policy of war risk insurance in the sum of Ten Thousand Dollars ($10,000.00), and at the time of said application authorized the deduction from his service pay of all premiums that might become due thereon, and thereafter there was deducted

from his monthly pay certain sums of money as premiums for said insurance to and including the month of May, 1919.

VI.

That a certificate of war insurance was duly issued by the terms whereof the defendant agreed to pay Omey E. Dyer $57.50 per month in the event that he suffered total and permanent disability, but that no policy of insurance was ever delivered to Omey E. Dyer or this plaintiff.

VII.

That while Omey E. Dyer was in the military service of the United States as aforesaid and during the World War, and subsequent to the effective date of said insurance, and while said policy was in full force and effect, this plaintiff served in the American Expeditionary Forces in France and while in France and in November, 1918, the said Omey E. Dyer was crushed in and about the abdomen by a truck and underwent exposure to the elements and suffered from the lack of shelter, food and water, and contracted hernia, adhesions, hypochlorhydria, Ileo Caecal Stasis, Gastroenteroptosis, Hyperthyroidism and Pharyngitis, and has continuously suffered from and been afflicted with general weakness and nervousness engendered by said exposure, hardship and injuries and diseases from a time prior to said discharge and from a time when said insurance was in full force and effect, and this plaintiff is informed and believes, and upon information and be-

lief alleges the fact to be that as a result thereof and of said injuries and diseases the said Omey E. Dyer became and was, at the time of his said discharge, and during the time said insurance was in full force and effect, totally and permanently disabled, and that this plaintiff is informed and believes, and upon information and belief alleges the fact to be that Omey E. Dyer was always so disabled and that as a result thereof he died upon the 1st day of May, 1929. That by reason thereof he became entitled to receive from the defendant the sum of $57.50 per month from the date of discharge, to-wit: April 25th, 1919, to the present time.

VIII.

That heretofore and upon the 23rd day of December, 1930, this plaintiff demanded of the defendant in writing payment of the benefits of said war risk insurance and on said date filed with the United States Veterans Bureau a written claim for said war risk insurance, but said defendant and said United States Veterans Bureau and the Director thereof and the Administrator of Veterans Affairs have disputed and denied the claim of this plaintiff and have failed and refused and now fail and refuse to make payments thereunder, and that said claim was denied by defendant on the 16th day of August, 1931; that the period of time elapsing between the filing of said claim with the United States Veterans Bureau and the denial thereof was more than six months; that a disagreement exists between the plaintiff and defendant and that

said disagreement has existed since the 16th day of August, 1931.

WHEREFORE, this plaintiff demands judgment against the defendant in the sum of $57.50 per month, from the 25th day of April, 1919, together with interest thereon, and his costs and disbursements herein incurred, and attorneys' fees, and that this Court determine what is a reasonable fee to be allowed plaintiff's attorneys, and direct the payment of said fees to plaintiff's attorneys.

Hawley & Worthwine,
Residence: Boise, Idaho;
Earl W. Corey,
Residence: Blackfoot, Idaho;
Attorneys for Plaintiff.

(Duly verified.)

(Title of Court and Cause.)

ANSWER

Filed Jan. 15, 1932.

COMES NOW the defendant in the above entitled action, and answering plaintiff's Complaint on file herein, admits, denies, and alleges as follows:

I.

Answering Paragraph I of plaintiff's Complaint, this defendant admits the allegations contained therein.

II.

Answering Paragraph II of plaintiff's Complaint, this defendant denies each and every allegation contained therein.

III.

Answering Paragraph III of plaintiff's Complaint, this defendant admits the allegations contained therein.

IV.

Answering Paragraph IV of plaintiff's Complaint, this defendant denies each and every allegation contained therein; in this connection, however, it is admitted that the insured was drafted for military service in the United States Army on August 5, 1918, and was honorably discharged therefrom on April 25, 1919.

V.

Answering Paragraph V of plaintiff's Complaint, this defendant denies each and every allegation contained therein; in this connection, however, it is admitted that on August 8, 1918, the insured applied for and was granted $10,000.00 of war risk term insurance, and that premiums thereon were paid to include the month of April, 1919.

VI.

Answering Paragraph VI of plaintiff's Complaint, this defendant denies each and every allegation contained therein; in this connection, however, it is admitted that a certificate of war risk insurance was duly

issued by the terms whereof the defendant agreed to pay the insured $57.50 per month in the event that he suffered total and permanent disability while said policy of insurance was in full force and effect.

VII.

Answering Paragraph VII of plaintiff's Complaint, this defendant denies each and every allegation contained therein.

VIII.

Answering Paragraph VIII of plaintiff's Complaint, this defendant denies each and every allegation contained therein, except insofar as said paragraph alleges that a disagreement exists between the plaintiff and the defendant, and in this connection it is admitted that a disagreement exists between the plaintiff and the defendant.

WHEREFORE, having fully answered plaintiff's Complaint, defendant prays that said Complaint be dismissed, and that plaintiff take nothing thereby, and that defendant have judgment for its costs.

H. E. RAY,
United States Attorney for the
District of Idaho.

RALPH R. BRESHEARS,
Assistant U. S. Attorney for the
District of Idaho.
Attorneys for the defendant.

(Duly Verified.)

(Title of Court and Cause.)

DEMAND FOR PRODUCTION OF PAPERS AT TRIAL

Filed Feb. 20, 1932.

To H. E. Ray, United States Attorney for the District of Idaho, and Q. A. QUIGLEY, Insurance Attorney for the United States Veterans' Bureau, Boise, Idaho, and to the Defendant above named:

You and each of you will please take notice that the plaintiff in the above-entitled action hereby demands that you produce at the trial of the above-entitled cause to be held at Pocatello, Idaho, on or about March 9, 1932, the following named papers, records and documents:

1. All physical examination reports made by the defendant of plaintiff, including all X-ray pictures in your possession.

2. All ratings for compensation, or otherwise, made by the United States Veterans' Bureau and pertaining or relating to the plaintiff.

3. His complete Veterans' Bureau file including hospitalization, compensation and insurance, and all his physical examination reports including X-ray pictures and physical and clinical findings.

4. The service records of said plaintiff while in the military service of the defendant during the period of the World War and particularly any and all records that relate to the physical condition of said plaintiff while in said military service, including hospital and clinical records.

Dated this 20th day of February, 1932.

EARL W. CORY
Residence: Blackfoot, Idaho;

HAWLEY & WORTHWINE,
Residence: Boise, Idaho;

Attorneys for Plaintiff.

Service of the above and foregoing Demand to Produce is hereby accepted this 20th day of February, 1932.

H. E. RAY,
United States Attorney
for the District of Idaho.

Q. A. QUIGLEY,
Insurance Attorney for
U. S. Veterans' Bureau,
Boise, Idaho.

(Title of Court and Cause.)

MOTION FOR DIRECTED VERDICT

Filed March 9, 1932.

Comes now the defendant at the close of the evidence on behalf of the plaintiff, the plaintiff having rested and the defendant having rested, moves the Court to direct a verdict in favor of the defendant upon the ground that the evidence is insufficient to show that the insured became totally or permanently or totally and permanently disabled within the meaning of the insurance policy at a time when the policy was in full force and effect.

2. That the evidence affirmatively shows that in fact the insured did follow continuously a gainful occupation subsequent to the lapse of the policy.

3. That the evidence affirmatively shows that the insured followed a substantially gainful occupation during the years 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, and 1927.

4. That a verdict should be directed as to any payments claimed to accrue after May 1, 1929, the date of the death of the insured for the reason that the complaint does not plead any contract for the payment to

beneficiary of any such payments after the death of the insured.

H. E. RAY
U. S. Atty. for the Dist. of Idaho.

SAM S. GRIFFIN
Ass't U. S. Attorney for the District of Idaho.
Q. A. QUIGLEY.

(Title of Court and Cause.)

COURT MINUTES OF MARCH 9, 1932

The defendant's motion to suppress portions of the depositions of John A. Gardner, Beulah Gardner and C. A. Dunn came on for hearing before the Court, counsel for the respective parties being present. After hearing counsel, the Court granted the motion in part and denied the same in part. The plaintiff was granted exceptions to the order granting said motion in part, and the defendant was granted exceptions to the order denying said motion in part.

TRIAL

(Reported by L. G. Hamilton and R. D. Bistline)

This cause came on for trial before the Court and jury, Messrs. O. W. Worthwine and Earl W. Corey,

appearing as counsel for the plaintiff and Sam S. Griffin, Assistant District Attorney, and Q. A. Quigley, Insurance Attorney for the United States Veterans' Bureau, appearing for the United States.

The Clerk, under directions of the Court, proceeded to draw from the jury box the names of twelve persons, one at a time, written on separate slips of paper to secure a jury. Henry S. Woodland, Henry Higson and Theo. Turner, Sr., whose names were so drawn, were excused on the plaintiff's peremptory challenge; and Chas. Lailatin and H. D. Davis, who were also drawn, were excused on the defendant's peremptory challenge.

Following are the names of the persons whose names were drawn from the jury box, who were sworn and examined on voir dire, found duly qualified, and who were sworn to well and truly try said cause and a true verdict render, to-wit:

Wm. L. Skidmore, Thos. M. Hughes, Stewart McCutcheon, Geo. W. Matthews, Joseph Chester, Reginald H. Cleare, George Giffings, K. M. Skaigiris, Henry A. Reynolds, J. B. Haddock, Stuart J. Davis and M. D. Bayley.

The Court announced that both parties may have exceptions to all adverse rulings.

After a statement of the plaintiff's case by his counsel C. E. Dyer, A. C. Springer, O. J. Jones, George Thomas, Wesley Thomas, Albert Hofer and Dr. J. O.

Hanson were sworn and examined as witnesses and the depositions of several witnesses were read and other evidence was introduced on the part of the plaintiff, and here the plaintiff rests. The defendant rested and the evidence was closed.

The defendant moved for an instruction to the jury to return a verdict for the defendant. After hearing argument of counsel, the Court granted the motion and instructed the jury to return a verdict for the defendant.

The plaintiff was granted exceptions and sixty days in which to prepare, serve and lodge proposed bill of exceptions.

The jury retired and subsequently returned into court and presented their written verdict which was in the words following, to-wit:

(Title of Court and Cause.)

Verdict

"We, the jury in the above entitled action, acting on instructions of the Court, find for the defendant and against the plaintiff.

Henry A. Reynolds, Foreman."

The verdict was recorded in the presence of the jury and then read to them, and they each confirmed the same.

(Title of Court and Cause.)

VERDICT

Filed March 9, 1932

We, the jury in the above entitled action, acting on instructions of the Court, find for the defendant and against the plaintiff.

Henry A. Reynolds, Foreman.

(Title of Court and Cause.)

JUDGMENT ON VERDICT

Filed March 10, 1932

This action came regularly on for trial, said parties appearing by their attorneys. A jury of twelve persons was regularly empaneled and sworn to try said action and evidence introduced on the part of the plaintiff. On motion of defendant's counsel the Court instructed the jury to return a verdict for the defendant and against the plaintiff. The jury thereby retired and subsequently returned into court, and, being called, answered to their names and presented their written verdict, as follows:

(Title of Court and Cause.)

Verdict

"We, the jury in the above entitled action, acting on instructions of the Court, find for the defendant and against the plaintiff.

Henry A. Reynolds, Foreman."

WHEREFORE, by virtue of the law, and by reason of the premises aforesaid, it is ordered and adjudged that the plaintiff take nothing upon his complaint herein, and that the defendant recover from the plaintiff its costs and disbursements herein incurred in the sum of $30.00.

Witness the Honorable Charles C. Cavanah, Judge of said court, and the seal thereof this 9th day of March, 1932.

(Seal) W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

BILL OF EXCEPTIONS

Filed May 12, 1932

BE IT REMEMBERED, That the above-entitled cause came on for hearing before the Honorable Charles C. Cavanah, District Judge, with a jury, at Pocatello, Idaho, upon the 9th day of March, 1932, at 10:00 o'clock A. M. at which time the following proceedings were had:

"MR. WORTHWINE: I would like to ask counsel if they have produced the papers we have demanded, the service and hospital records of the defendant, of Mr. Dyer?

MR. GRIFFIN: We have no service record."

WHEREUPON, a jury was impaneled.

"MR. WORTHWINE: It is stipulated, if your Honor please, that Omey E. Dyer entered the United States Army August 5, 1918, and was honorably discharged April 25, 1919; that on August 8, 1918, he applied for and received a policy of insurance in the amount of $10,000.00, payable in monthly instalments of $57.50 per month; that the policy was in force by virtue of the actual payment of premium, and including the grace period, to midnight of May 31, 1919; that Omey E. Dyer died May 1, 1929; and that his father, Charles E. Dyer, is the beneficiary named in Omey E. Dyer's policy of war risk insurance.

MR. GRIFFIN: It may be so stipulated.

THE COURT: All right.

MR. GRIFFIN: May it be understood we may have an exception to all adverse rulings of the Court.

MR. WORTHWINE: Yes, both parties.

THE COURT: Very well, both parties."

WHEREUPON, after an opening statement by counsel for the plaintiff, the cause continued.

CHARLES E. DYER, a witness called on his own behalf, after having been first duly sworn on oath, testified as follows:

DIRECT EXAMINATION

By Mr. Corey.

"MR. COREY: He is quite hard of hearing.

MR. GRIFFIN: I wonder if you would instruct him not to answer until I can object, if I have an objection.

Q. Mr. Dyer, when I ask you a question, if Mr. Griffin should object, you wait with your answer until he has time to object.

A. All right."

My name is Charles E. Dyer. I am plaintiff in this action. I live at Blackfoot, Idaho. I have lived there since 1917. I am a farmer by occupation. I am the father of Omey E. Dyer. I remember when Omey E. Dyer returned to Blackfoot after his discharge from the army. It was sometime in May, the month of May, in the year after the Armistice was signed. He stayed at my place.

"Q. Did he work?

A. He helped around with me. He wasn't able to go on.

MR. GRIFFIN: Just a minute. I move to strike

'he wasn't able to go on', as a conclusion.

THE COURT: It may be stricken."

Omey Dyer stayed at my place about three months. Then he went on the highway as a foreman. I did not see him at any time during his employment on the highway.

Q. Did you hear the question, Mr. Dyer?

A. Not thoroughly. No, I didn't understand the question?

Q. During the time that he was employed on the highway did you see him at any time?

A. Why, yes, he used to come home Saturdays.

Q. At any other time?

A. When he was sick, he would come home and lay off and then go to work again."

He was employed around Blackfoot something like three years. He left Blackfoot. He came back once after he went to Oregon. I can't call to memory when he came back. He was taken to the Veterans Hospital. He was at my place when he left for the Veterans Hospital. He was at my place when he was taken to the Boise Hospital. He died at Boise.

Certified copy of letters of administration to the witness in the estate of Omey E. Dyer, deceased, admitted in evidence as plaintiff's Exhibit No. 1.

CROSS EXAMINATION

By Mr. Griffin.

I can't hear very well. After Omey came back from the Army he went to work as foreman on the highway. He was working for Mr. Thompson. Mr. Thompson was doing county highway work. Omey Dyer worked for him as foreman all that summer. He was getting 16c more an hour than the rest of the laborers. That continued as long as there was any road building in 1919. In 1920 when the road work opened up again, he went back on the road, same kind of a job. He worked all during 1920 to the best of my knowledge and at the same pay. In 1921, I don't know whether he went back to the same job. I don't recall whether he went back there or whether he went to Oregon. He was still on the highway work as long as he lived there. He went over to Ontario sometime in 1921. I think it was in 1928 when he came back. He came back in the spring. He went to the Veterans Hospital in August.

A. T. SPRINGER, a witness called on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION

By Mr. Worthwine

My name is A. T. Springer. I was in the hardware business. I have lived in the State of Idaho 22 years at Blackfoot, Mackey, and Idaho Falls.

I was acquainted with Omey E. Dyer during his lifetime. I became acquainted with him in 1913. He was living at Blackfoot, before he went into the army.

I saw Omey E. Dyer after his return from the Army. I saw him the day he got off the train when he came back from the army. I could not give the exact date. It was in the year 1918 or 1919 after the Armistice. It was in the spring. He came to my store on Main Street in Blackfoot. That was the day he came back.

"Q. Now, tell us the facts, Mr. Springer, what you observed about Omey E. Dyer at that time. Don't state any conclusions.

A. He was either on crutches or had a cane, I don't remember which to the best of my recollection. He was much lighter in weight than he was when I saw him before he went to the army, his complextion was bad, and he looked like a sick man.

MR. GRIFFIN: I move to strike 'he looked like a sick man', as a conclusion of the witness.

THE COURT: It may be stricken.

MR. GRIFFIN: And the jury be instructed not to regard it.

THE COURT: The jury understands that when any testimony is stricken by the Court they are not to consider it."

I would say that Mr. Dyer stayed around Blackfoot two or three years after he came home. I am not positive as to the exact time. I saw him during that time.

I noticed that he was pale, and at different times he complained of pains in his stomach. He never regained his weight, the weight he had when I first knew him.

I saw him when he was back in Blackfoot in 1927 or 1928. I noticed that he was pale after he returned from Oregon. He used to have a breaking-out at times around his mouth, sores. He complained of his stomach continually whenever I saw him. I have seen him do work.

One particular time he was down to his father's ranch and he attempted to saw a board in two. He had to stop two or three times during the time he was sawing it due to weakness, or coughing. That was after he returned from Oregon.

I saw him walking around on his father's place. This was after he came back from Oregon. He was weak and short of breath and had to sit down and rest. He would be very short of breath after he walked two or three hundred yards. This condition continued until he left Blackfoot.

CROSS EXAMINATION

By Mr. Griffin.

I would say I saw him after he came back from Oregon 20 times, possibly. I would say I saw him over a period of a couple of years after he came back from Oregon. I can't remember the exact date.

A short time after he returned from the Army, he

went to work on the highway. Then he remained on the highway until he left for Oregon, to the best of my recollection.

REDIRECT EXAMINATION

By Mr. Worthwine

"Q. You don't know how much he was off while he was on the highway, do you?

A. I couldn't answer that question, although I saw him at different times."

OWEN J. JONES, a witness called on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION

By Mr. Worthwine

My name is Owen J. Jones. I am a farmer by occupation at Blackfoot, Idaho. I have lived in Bingham County twenty-five years.

I was acquainted with Omey E. Dyer before the war. I am not related to him or his father in any way. I saw Omey E. Dyer about a couple of weeks—a few days after he came back.

"Q. And what did you notice about him, if anything at that time. Just tell us the facts, Mr. Jones, we don't want conclusions.

A. Well, he stooped a little, he was pale. He looked like he was weak.

MR. GRIFFIN: No, just a moment. I object to any conclusions, your Honor.

THE COURT: Sustained."

He moved with a limp, favored his side, and was short of breath.

I was working with him pitching hay when he quit, gave out, he couldn't go on. That was in June after he came back from the army. He started to work in the morning and he lasted about an hour and a half or two hours and quit pitching hay. There was a hay crew out there pitching hay. I was pitching hay on one side of the wagon and he was pitching hay on the other side. He went home, quit.

I saw him again after he returned from Oregon. It was at his father's ranch. His father had a thirty-acre farm.

I noticed he was weak and stooped and was a lot weaker than before he left, pale.

CROSS EXAMINATION

By Mr. Griffin

Omey Dyer stayed around Blackfoot two or three months, something like that, after he came back from the service. I couldn't give the exact date. I was right with him there two or three months, right at home, then he was gone. I saw him from time to time before he went to Oregon. He was working as foreman on the

highway during that time. He was working for the county.

When he came back from the army, he had a cane, if I remember right. He used a cane off and on after that. I recall he had it all the time, not all the time, at the time I would see him at home, he would have a cane with him. This happened from the time he came out of the army until he went on the highway. I didn't see him much during the time he was on the highway. After he went on the highway, I didn't see him with cane or crutches. I would see him home on Sundays.

"Q. Do you know that he would come home off the highway at the end of the week, and stay over the week end at home?

A. I have seen him more than once."

WHEREUPON, the deposition of John A. Gardner taken at Klamath Falls, Oregon, on the 11th day of February, 1932, a witness on behalf of the plaintiff was read in evidence.

DIRECT EXAMINATION

By Mr. Stone

My name is John Albert Gardner. I am 39 years old. I live at Klamath Falls, Oregon. My occupation is contractor. I was acquainted with Omey E. Dyer practically all of his life time. I first became acquainted with him about the year 1900. I was seven years

old and he was about nine. I was acquainted with him from that time up to the time of his death. I am a brother-in-law of his—he married my wife's sister. Omey Dyer's wife died about a year after he died. They had one child and I have the child. I first became acquainted with Omey Dyer at Mackey, Idaho, and was near or with him practically all of the time from his discharge up until about a year before his death. I saw Omey Dyer in France.

"Q. What was the condition of his health during all the time that you knew him, prior to the war?

MR. RYDALCH: I object to the question of any condition prior to the War as we are only interested in Omey Dyer's condition from the time of the lapsation of the policy involved in this case.

THE COURT: Sustained."

I saw Omey Dyer in France during the war. Later I attempted to locate him, but could not find where he was. I did not see him in France after that.

I saw him in August of 1919 after his return from the Army. His physical condition looked to be very poor at that time. He was pale, and he limped when he walked; kind of pulled over to one side.

"Q. How was his weight compared to that before the war, during the war before he was run over by the truck?

A. He was lighter in weight after he was discharged from the army."

He had a poor appetite; whether his rest was good or not, I couldn't say.

"Q. State whether or not he appeared to be exhausted?

A. He did.

MR. RYDOLCH: I object to the type of leading questions.

THE COURT: Sustained."

He became tired easily upon exertion. He was fond of fishing and hunting before he went to the war, but he did not hunt and fish as much after he came back, though he went hunting and fishing some. He used to engage in sports before he went to the war, but to no great extent. He didn't engage in sports after he got out of the army.

"Q. What was his color, was it healthful, or otherwise, after he got out of the army?

MR. RYDALCH: Object to the question as a conclusion.

THE COURT: Sustained."

He appeared to be a sick man. His physical condition became increasingly worse. He wasn't able to work continuously. He would try to work and become sick, might drop helpless right where he was working. I was engaged in work with him. I picked him up several times when he dropped right where he was working.

He was engaged in the contracting business—he and

I contracted together. He would be down sick and be unable to work—be too sick to work. The first time this happened was at Roseburg, Oregon. He took an awful pain in his back and we had to carry him in. He was helpless, sick for some time afterwards.

One of the very same spells happened to him at Hornbrook, California. He would become almost paralyzed; he would drop right where he was working. He seemed to be in great pain. We would have to put him on a stretcher, or cot, or whatever we might be able to get hold of, and carry him home that way.

He had another one of these spells at Chemult, Oregon, in 1927. This time he fell from the scaffold. He was in the hospital about six months.

"Q. Was he able to use a pick and shovel?

A. No.

MR. RYDALCH: Objected to as a conclusion—not whether he was able to, or whether he did.

THE COURT: Sustained."

He tried to use a pick and shovel, but couldn't do it. He was terribly nervous. He could not do the ordinary tasks that other men could easily perform. I was with him practically all the time after his return from the war with the exception of one year before his death. I lived in the same house with him when we were out in camps, or had business out in the camps. He was sick in bed about one year of the time after he returned from the war, not counting the last year that I wasn't

with him. He was under a doctor's care a fourth of the time.

"Q. What condition, or how was his stomach, did he retain his food when he ate it, or not?

A. No, he would have bad vomiting spells."

He would have vomiting spells both before and after eating. He vomited blood. He never used alcohol or tobacco in any form. I saw him take a lot of medicine at various times. He walked with a limp and bent over to one side—the right side.

"Q. Was he able to work at any gainful occupation during the time after he came from the war?

MR. RYDALCH: I object as a conclusion and this witness is not qualified to state whether he was or whether he was not. That is certainly a question for medical testimony.

THE COURT: Sustained."

He did not appear to be nervous when I saw him in France.

CROSS EXAMINATION

By Mr. Rydalch

I have had Omey Dyer's child about two years—this is the only child. I have not legally adopted this child. I did not serve in the same outfit in the army with Omey Dyer. I first saw him in France in November, 1918. I did not see him again while he was in the army.

The first time I saw him again was August, 1919. There was a weakness in his condition, he was pale and he limpted when he walked. He didn't look like he would weigh over a hundred and thirty-five. He looked about twenty pounds under weight. He weighed about 150 when I saw him in France, and when I saw him in August, 1919, he was about twenty pounds light. I was with him practically all the time after August, 1919, until about a year before his death, and it seemed to me his condition got worse, he got more nervous all the time. He quit work entirely in 1928.

The attack that he had at Roseburg was about September, 1922—that was the first paralytic spell, or whatever you might call it, I saw him have.

The attack at Hornbrook, California, was in 1923, and he had to quit work again at Chemult, Oregon, in 1927, but there were other times between 1923 and 1927, he had to quit work also. It was about every six months he should have went to the hospital or had a doctor's care.

Omey Dyer and I were partners. We were sub-contractors, working under many other contractors. This firm continued about three or four years, from 1923 to 1927. The earnings were divided 50-50. We made about Four Thousand a year—Omey Dyer made about $2,000 in 1923, 1924, 1925, 1926 and 1927. We made income tax returns in 1926 and 1927. I saw Omey Dyer after he fell off the scaffold in 1926, and when I saw him he was laying down on the ground. I did not

see the accident. I do not know how he hit when he fell. He always complained of his back. The first time I knew of his seeing a doctor after he got out of the army was at Hornbrook in 1923—Dr. Lucas. He went to Portland to some doctors after that, but I don't know their names. Drs. Truax and Hunt treated him when he fell off the scaffold. I believe both before and after the operation for appendicitis by Dr. Hunt.

I am an ex-service man, but have never filed for any compensation or payments from the Government. I knew of the benefits. I don't believe Dyer ever made a claim to the government for this condition he had. He talked of doing it several times. I told Omey Dyer I thought he was more entitled to benefits probably than lots that were getting it.

"Q. Well, did you and he consider his condition serious enough to make those claims back in 1923, 1924, 1925 and 1926, when you were running this partnership?

A. If it had been me, I would have filed a claim and not tried to work."

Q. But during those years of 1923 to '27 you have testified he made approximately ten thousand dollars as the result of his copartnership with you on this contract job?

A. Well, the two of us together made that much.

Q. Well, you said he made approximately two thousand dollars a year, did you not, for 1923, '24, '25, '26,

'27. Well, dividing that up, that would be approximately—that is what he received.

A. He received fifty-fifty of all we made.

Q. Well, for the five years, at two thousand dollars a year, he would have received a total of ten thousand dollars for those five years, wouldn't he?

A. Yes, sir; I expect it would probably have amounted to that.

REDIRECT EXAMINATION

By Mr. Stone

"Q. Why did you divide 50-50 with him if he didn't keep up his end of the work?

MR. RYDALCH: I object to that testimony. There is no testimony on direct examination that he didn't keep up his end of the work.

THE COURT: Sustained."

The partnership finally dissolved because he got down so bad that he had to go under a doctor's care and stay there all the time. He called my attention, thousands of times, to the fact that he wasn't keeping up his end of the work.

Q. And why did your partnership dissolve finally?

A. Well, he got down so bad that he had to go under a doctor's care and stay there all the time.

Q. Did he ever call your attention to the fact that he wasn't keeping up his end of the work.

MR. GRIFFIN: Just a moment. I object on the ground that it is incompetent and hearsay. That calls for what the man said.

THE COURT: Overruled.

A. Yes, he did thousands of times.

Q. And did he want to take half the proceeds.

MR. GRIFFIN: The same objection, your Honor. Whether he wanted to take half of the proceeds called for a conversation or statements.

THE COURT: Overruled.

A. Well, he did not exact half the proceeds.

Q. Why?

MR. GRIFFIN: The same objection, your Honor.

A. He felt like he hadn't earned them.

MR. GRIFFIN: After that answer, I move to strike the answer because it shows obviously it is hearsay.

THE COURT: It is hearsay—what he says he felt like. Sustained. That is purely hearsay.

"MR. WORTHWINE: If your Honor please, at this time I will ask the Clerk to mark as Plaintiff's Exhibit No. "2", Bulletin No. "1", and as Exhibit "3", Regulation No. "11".

MR. GRIFFIN: Bulletin No. "1" is what exhibit, is that No. "2"?

MR. WORTHWINE: Yes.

MR. GRIFFIN: And Regulation No. '11'?

MR. WORTHWINE: No, '3'.

MR. GRIFFIN: No objection.

THE COURT: Admitted.

MR. WORTHWINE: Regulation No. '11' is relative to the definition of the term total disability, and the determination as to when total disability shall be deemed permanent.

'Treasury Department,
Bureau of War Risk Insurance,
Washington, D. C., March 9, 1918.

'By virtue of the authority conferred in Section '13', of the War Risk Insurance Act the following regulations is issued relative to the definition of the term 'Total disability' and the determination as to when total disability shall be deemed permanent.

'Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed in Article III and IV to be total disability.

'Total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue through the life of the person suffering from it. Whenever it shall be established that any person to whom any installment of insurance has been paid as provided in Article IV on

the ground that the insured has become totally and permanently disabled, has recovered the ability to continuously follow any substantially gainful occupation the payment of installments of insurance shall be discontinued forthwith, and no further installments thereof shall be paid so long as such recovered ability shall continue.'

'William C. Delanoy,
Director.'

Approved: W. G. McAdoo,
Secretary of the Treasury.'

GEORGE THOMPSON, a witness produced on behalf of the plaintiff, after having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Worthwine

I am George Thompson, a laborer by occupation. I live at Blackfoot. I have lived in the State of Idaho twenty-two years. I was acquainted with Omey Dyer during his lifetime. I knew him before he went into the army.

I served in the army at Fort Douglas, Utah. I was in the Medical Corps. I served in the Medical Corps at Fort Douglas, Utah, about 18 months. While I was at Fort Douglas, it was made into a base hospital. The first year I was there, there were troops there, but they

took them all away and made it a hospital. I was a sergeant in the Medical Corps.

I saw Omey Dyer at Fort Douglas. It was along about the first of February. He came back to Fort Douglas with a bunch of convalescents, and I wasn't right in the hospital when they were taken in. I left the morning that Omey Dyer got there, the same day. I left in the morning and he got there about noon. I came back on Sunday evening and saw Omey Dyer on Monday morning. I went up to the hospital and saw him, and he was in bed. He was there in bed, couldn't hardly move. I saw him again that evening about 7 o'clock. He wasn't entirely out from under the influence of ether.

Mr. Dyer stayed there in the hospital about two months after that. I saw him occasionally, and I noticed that his face was all drawn, he was stooped, and he had to go part of the time with crutches. Then towards the last he went with a cane. He complained of his stomach all the time he was there. I saw him about a week before he was discharged from the army, and he was using a cane. I know that he was in the hospital as a patient. I saw him here at Blackfoot after I was discharged from the army. He was able to go without a cane, but he was still limping and still complained of his stomach.

CROSS EXAMINATION

By Mr. Griffin.

I would see Omey Dyer around Blackfoot occasionally. I did not see him out on the highway where they were building highways. My father had charge of some county work.

WESLEY C. THOMPSON, a witness produced on behalf of the plaintiff, after having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Worthwine

I am Wesley C. Thompson. I live at Blackfoot, Idaho. I have lived in the State of Idaho 22 years. I was acquainted with Omey E. Dyer. I am not related to him in any way. I became acquainted with him first about 1915.

I saw him first after the war on his father's place southwest of Blackfoot. It was sometime in the fore part of May. I think just the first, the first part of May in 1919.

I noticed that he was drawn over and he walked with a cane and complained quite a bit about his stomach. He worked under me. He went to work for me on the 14th of July, 1919. I was bridge foreman and Omey Dyer was a form builder. He was the boss of the form builders.

I would say he worked under me about half a month before he took sick. He went to work on the 14th and took sick on the 28th. He worked 14 days.

I took him to Dr. Hampton. Dr. Hampton was at Blackfoot. Then he worked off and on some through August. I couldn't give you the exact date. Then he took a foremanship for himself. The man that had charge of the county work came to me and asked me if I didn't think Omey was capable of it, and I told him that he was perfectly, but I said, "He will take sick again." "Well" he said, "we can fix that." Of course, when Omey did take sick he was terribly sick, that is all.

When he took sick, he simply turned pale. He would first get some sores around his mouth, and inside his mouth, and then he would commence vomiting and he would vomit everything out that was in him; then he would get down on his hands and knees and he would vomit up slime and awful looking stuff. I am not in the habit of looking at what a man vomits, but he would get terribly sick. Sometimes he would get over it and the next morning he would go back to work, but I would say that he took sick as much as three times before I took him to a doctor. I think the third time I took him to a doctor.

I think the last time he worked under me was in April, 1921. He was working for me at the time he quit and went to Oregon.

I saw him off and on between the time he went to

work in 1919 and 1921. He did work for me some of the time, that is, not continuously, not even when he wasn't sick. He worked about five months, I think, up in Bonneville County, or he was up there. I don't know how much of the time he was sick. I don't know anything about him any more than that I know he came down from there once sick, and stayed at my place three or four days. When he was at my place, I just observed that he was sick. I noticed that he was pale and weak and that is all practically that I can tell you. I did notice he would take vomiting spells or gagging spells.

"Q. How long did those gagging or vomiting spells last to your knowledge? I mean over what period of time?

A. Well, it lasted all the time that I knew him after he came out of the army.

Q. And how about his being on the job or off it during the time he was working for you from 1919 to 1921?

A. I couldn't say, but I would say that at the time we were at work he would be off one-fourth of the time with this sickness. I would say about one-fourth. I couldn't tell you exactly."

I would say I saw him in 20 or 25 spells between 1919 and 1921. I would say that it was that many. It might have been a few more or a few less, but I would say twenty times anyway. Of course not every time he would take a vomiting spell it wouldn't necessarily mean

that he was going to be sick, that is, it would mean he was sick for four or five hours, might go to camp and go to bed and maybe after dinner he would get up and go to work again. Then, other times, he would get those sores in his mouth, then invariably we would have to send him home.

I saw him in the spring of 1927 or 1928. I think he was home here in 1927 before he went to the Veterans Hospital. I think it was a year and four or five months. I saw him at my place and his father's place. Well, I just observed that he was sick, that is all. There was times when I would see him that he was very drawn and stooped, and sometimes he would walk with a cane, and other times he didn't. Once in particular I seen him and his father go out to the barn to milk. He took sick and couldn't milk, and he always complained of his stomach.

CROSS EXAMINATION

By Mr. Griffin.

When I said that I sent him home, I meant by that either to my place or his father's place, either one was home to him. My book does not show when he came back to work after the 28th of August, 1919. I have no record of it. When he came to work after August, 1919, I kept a record, but mislaid the book. This is my time book for July, 1919. My time book shows

that Omey Dyer put in five hours on July 14, 1919, and that is what the other men put in on that day. And on the 15th, 17th, 18th, 19th, 21st, he put in nine hours. I didn't put down the number of hours he worked on the 22nd or 23rd or 24th. On the 25th I changed him from laborer to carpenter. He did just the same work after that. I hired him to oversee the construction form builders. He was a kind of a foreman. His duties were to see that the forms were properly placed and built so that when the men put the concrete in they wouldn't give out. Omey Dyer could read blue prints. He was a very competent workman. I paid him 65c an hour and paid the other men 50c an hour. On the 24th and 25th and 26th, he worked nine hours which is all the time I kept in that book. The other book I lost and couldn't find.

He came back to work for me later, I think it was about a week, and I put him at the same kind of work. That was during August. I haven't any record of how long he worked in August. I know he worked some, but how much I couldn't say. They wanted a foreman for the same kind of job I had. That job paid about 75c an hour and on my recommendation Mr. Dyer was hired by this other man. He would leave my crew, except when he would take sick they would come for my crew, and I would have both crews. In the meantime he was handling a crew of his own just the same as I was. This continued until some time, I think it was the last of April, 1920. I can't remem-

ber when he went up to Bonneville County, and when he was up there I was out of touch with him only when he would come home. He was engaged in Bonneville County in the same occupation.

In the fall of 1920 he came down to Bingham County. He worked under me. He was not a foreman then, I was county roadman and he was working under me. If there was a bridge to be fixed, Omey and I went and looked after it ourselves, together with the other men. I hired and fired on that crew. Omey Dyer was paid 65c an hour and that was more than the other men was getting. This work ran about 3 days a week for the winter, it would average about that. Sometimes a whole week and maybe the next week didn't do anything. It was seasonal work, that is depending on the season and whether the work was there. That is, it was all done that way, except once I remember I went after him and he said he couldn't go, that he was sick. I didn't ask him what way or anything. He just said he couldn't go, he was sick. I think it was twice, but I won't be positive. This continued, I think, up until April, 1921, and then he left Blackfoot and went to Oregon. Mr. Dyer worked for a man by the name of Stone when he was up in Bonneville County. I wasn't in touch with Mr. Dyer from 1921 until he came back in 1927.

ALBERT HOEFFER, a witness produced on behalf of the plaintiff, after having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Worthwine

My name is Albert Hoeffer. I reside at Blackfoot, Idaho. I have lived in Idaho 34 years. My occupation is farming. I was acquainted with Omey E. Dyer. I am not related to him. I remember when Omey Dyer went into the army and I also remember when he came back. I saw him first in the spring of the year. We were putting in crops, and I passed his place, and I saw his father. His father told me that his boy was back, and I stopped and went in to see him. He was sick and could hardly walk around. He favored his side and was pale, weak, I think he used a cane.

I saw him when he came back from Oregon in 1927 or 1928. I noticed at that time that he was exactly as he was when he first came back from the army, only more serious. I saw him try to work in the winter of 1927, I guess it was. I don't remember exactly. He came to my place to get a load of hay with his father. They were loading my hay and I was doing some of the chores, and I happened to look around and Omey Dyer was laying on the hay stack, pale. I asked him what was the matter. He said, "I can't work."

"MR. GRIFFIN: No, just a moment. I object to the statement.

THE COURT: Sustained."

I offered to help him and he laid on the stack until I finished helping load the load. I remember the oc-

casion when he was hauling some fertilizer after he came back from the army. He had to stop and rest. He just couldn't make it. He would work a little while and then he would have to stop, and there was another occasion. This time he was loading hay and he vomited. I also noticed the sores around his mouth.

CROSS EXAMINATION

By Mr. Griffin.

It was in the spring of the year that he got the hay from me. It was in April, I think. I guess it was in 1928. I am not positive whether it was the spring of 1928 or 1927. It was the same year that he went to the hospital in August. I remember when he went to the hospital and he died in May of the next year, and that was after he came back from Oregon.

WHEREUPON, the deposition of BEULAH GARDNER taken at Klamath Falls, Oregon, on the 11th day of February, 1932, a witness on behalf of the plaintiff was read in evidence.

DEPOSITION OF BEULAH GARDNER

DIRECT EXAMINATION

By Mr. Stone.

I am 37 years old, and live in Klamath Falls, Oregon. I am a housewife. I was acquainted with Omey Dyer

in his lifetime. I first became acquainted with him about 1921 at Ontario, Oregon. At that time he was foreman for a construction company. He married my sister in 1923. I have charge of the little child that he left—she is fifteen years old.

I didn't see Omey Dyer until after he was discharged. After 1923, I knew him quite well. The first time I saw him, he didn't look to be very strong, and he was nervous and pale, had a bad complexion. Sometimes his appetite was good and other times it wasn't good. When he would be sick, he wouldn't have any appetite at all. For the last three or four years that I saw him, any one would say that he had lost considerable weight. He appeared to be exhausted. He became tired easily when he worked. He did not engage in any social activities to speak of. His color was pale—yellow.

"Q. Did he appear to be a sick man or a well man?

MR. RYDALCH: Object to that question as leading, and further more as conclusion of the witness. She could state how he appeared to her.

THE COURT: Sustained."

His physical condition became worse, he was just so he was shaky. Part of the time he did light work. He worked not more than one-half of the time, if he worked that much. I have seen him lots of times when he tried to work and couldn't.

When they were working at Chemult, he would come in completely exhausted, and when they were working

out here on the dam, I don't know just what year that was, on the highway to Bly, he would get completely out and be sick in bed for days.

I would say he was sick in bed close to eighteen months after he returned from the war. He was in bed at home lots of times. He was under the doctors' care possibly about a year. I saw him taking medicine. I have seen him vomit—he would vomit blood. I saw him have one of his spells when he would fall down at Chemult, and his legs and hands shook. Even though he wasn't right in one of those spells, he would be that way, so he couldn't hardly stand, he would shake so. He walked like an old man, he seemed to be lame. When he was sick he always complained of his back and his stomach.

CROSS EXAMINATION

By Mr. Rydalch.

I met Omey Dyer in July or August of 1921. He was then working as foreman on construction work, highway work, culverts and bridges at Ontario. He worked there a couple of months; I believe until that particular job was completed there; he married my sister in 1923. Omey Dyer and his wife after their marriage lived in camps when they were working, and the bills were all put in together and paid. His wife wasn't working, but the bills was paid before the money was divided up. They lived in camps all the time and

Mr. Dyer supported her. It was contract work. I was at Roseburg when Mr. Dyer had the first so-called spell, but I didn't see him in that one and I know of none he had before that. His condition after I knew him in 1921 grew worse. He finally had to quit work. He was in the partnership up to 1927, and my husband's recollection of his gross earnings from 1923 to 1927 was approximately correct.

"Q. Would you state that your husband's remembrance also of Mr. Dyer's gross earnings were the same, two thousand dollars for those five years?

A. Well, they divided the money that way."

His condition, after I knew him in 1921, grew worse. After the dissolution of the partnership, Mr. Dyer didn't do any work, he wasn't able to do anything. His father had a little place in Blackfoot, so he just went back there to live and stay with his family. He was in the hospital at Boise for nine months, or seven months —that is where he died.

WHEREUPON the deposition of C. A. DUNN taken at Klamath Falls, Oregon, on the 11th day of February, 1932, a witness on behalf of the plaintiff was read in evidence.

DEPOSITION OF C. A. DUNN
DIRECT EXAMINATION

By Mr. Stone.

My name is C. A. Dunn. I am 43 years old—live in

Klamath Falls, Oregon. My occupation is contractor. I was acquainted with Omey Dyer in his lifetime—am not related to him in any way. I first became acquainted with him in Klamath Falls in the fall of 1922.

I was associated with him until about a year before he died. In the spring of 1923 he went to work for us. He was associated with John Gardner when he was working under contract. He was working as subcontractor. He always had a limp—not so much of a limp, but he leaned a little sideways. He kind of pulled over to one side like he was in misery—I think his right side. He was always that way, sometimes worse than others. I never knew anything about his stomach. He was never in good health from the time I knew him. I did not know him before he went to the war. He complained of his stomach. He told me about his injury, and at the time he didn't take it very seriously.

He was the most cantankerous man I ever saw. I will say this, that I never cared for him. It was probably his physical condition—he was always looking for a quarrel. He couldn't get along with anybody. I don't see how his partner ever got along with him.

"Q. Well, his being personally obnoxious, did you attribute that to his nervousness?

A. I did."

He quarreled not only with the fellows around him, but the inspectors. That is what gave us the most trouble, his quarreling with the inspectors. He seemed to be, as I look back upon it, I imagine he was in misery

like a man that has kidney trouble. He may have always been that way. His face was drawn, he sometimes looked like a corpse. He never could stand very much physical work. He wasn't on the work all the time, but his partner was, and it was on account of his partner that the contract was kept up, and we probably wouldn't have signed the contract if it hadn't been for his partner. He became tired easily upon exertion and he couldn't stand but just a little work.

He did not engage in any kind of social activities that I knew of. I never knew him to do anything outside of his work, such as outdoor sports, baseball, etc; he wasn't able to work continuously. He was off the job quite often. I have no record of how much, but quite a lot. He was always sick. In fact he kept growing gradually worse after he went to work, and we thought two or three times he would never come back to work, but he did. His physical condition became worse. He worked half the time, I guess, possibly a little more or less. You couldn't be very accurate on that.

He did some physical labor, but he couldn't do it continuously. He was a very efficient workman when he could work. He had to limit himself very carefully to the things that were essential. He was the only man on the job that could do certain things. His partner handled the men, principally, and did all the work when he wasn't there, and looked after the business in a general way.

He was in the hospital part of the time, and I am quite sure he was under a doctor's care. Many, many times he was forced to leave the job and go home sick. I couldn't give any particular time because it's a long time ago. He worked on numerous jobs for us too. I never saw him vomit. He was continually complaining of his back and side. It seemed when he was here that that was all the matter with him. They decided it was his appendix that was causing the trouble, and they cut it out, but it didn't help him, didn't do any good at all. I don't know how his appetite was. He complained of his stomach in connection with this injury, but I was never around him much when he was eating. He ate at our cook house some, but I never noticed.

CROSS EXAMINATION

By Mr. Rydalch.

I first became acquainted with him in the fall of 1922. He and Gardner had a number of subcontracts with me. They started in 1923 and worked for us, I believe, every year—most years until he left there. They had one or two contracts not with us, but they were short duration. I am not sure when he left. I think it was 1928, but it may have been 1927. They were doing principally concrete work, putting head walls on culverts, building box culverts and bridges. He worked at this subcontracting work about five years.

I generally saw him once a day, but sometimes I didn't, it would be a week before I would see him—I came in contact with him purely in a supervisory capacity. I saw him most every day but sometimes a superintendent on the job doesn't go over it each day. I couldn't tell whether he worked an entire day or not.

Mr. Dyer and Mr. Garner always had some men working for them. I don't know what their maximum would be, but I imagine it would vary between five and twenty, somewhere along there. Like most contractors, they tried to do the skilled jobs—the ones that require special skill and high priced labor. I remember him getting hurt a little, but I don't remember what he was doing at this time. They operated on him for appendicitis at the hospital. His condition gradually got worse. They dissolved the partnership because he couldn't longer hold up his end of the work. In fact, the last year, I think it was rather a heavy burden on the other fellow, but up to that time they had carried on the subcontract.

He gradually grew worse and worse. I imagine the fact that he was a brother-in-law, had a lot to do with his being a partner. He never was entirely holding his end up. Probably the fact that he was very skilled in carpentry, cutting difficult angles and things of that kind helped to hold them together too. At least he had a spark of knowledge there that was worth while, outside of his ability to work. I couldn't say how long he was under the care of doctors. I would know if he was

off for any extended length of time. He could be off part of the day and I wouldn't know. I couldn't give any definite dates of extended periods when he was off.

I would say he was off work from time to time, sometimes as much as two or three weeks, he would be gone, and I don't think he always went to the hospital, sometimes he stayed at home. They had two subcontracts under other general contractors, but most of that five years they were subcontracting under me.

WHEREUPON the deposition of DR. WARREN C. HUNT taken at Klamath Falls, Oregon, on the 11th day of February, 1932, a witness on behalf of the plaintiff was read in evidence.

DEPOSITION OF DR. WARREN C. HUNT

DIRECT EXAMINATION

By Mr. Stone.

My name is Warren Coe Hunt. I am 42 years old. I reside at 647 Pacific Terrace, Klamath Falls, Oregon. I am a physician and surgeon. I have been licensed to practice medicine 21 years. I am a graduate of Starling Ohio Medical College in Columbus, Ohio. I am licensed to practice my profession in Ohio and Oregon. I have practiced in Oregon for 21 years—in Klamath Falls.

I was acquainted with Omey E. Dyer during his lifetime, and became acquainted with him when he came

to my office for treatment. The first time I treated him was at the time of his application at my office, February 20, 1926, and for several months subsequent to that time I treated him.

At that time, he gave me a history of his trouble. His history was that of long standing nervous difficulty and dating from his war service, wherein he had been injured in that service. His back and chest had been injured and he had been unable to work steadily since that time, since he had been mustered out. The immediate difficulty for which he came for treatment at that time, however, was nervous unrest, and upon examination, I found that he had a difficulty with his gums, pyorrhea notably, and general nervous debility. He also stated that he had been run over by a truck, which caused the injury.

Afterwards I operated on him for acute appendicitis, and at that time found extensive intestinal adhesions, and he was also suffering from hyperacidity and chronic indigestion. The internal difficulty may have been occasioned by his injury in 1918. He was pale, anemic and weak, and highly nervous.

I prescribed appropriate treatment for his mouth condition and indigestion, administration of an iron preparation for his anemia, sedatives for his nervous condition, and tonic treatment.

He was under my care for a period of about six months. I performed an operation for acute appendicitis. As to whether or not the condition of acute ap-

pendicitis might have been brought about by his being run over by a truck, that is hard to say. The condition of bowel stasis induced by adhesions that have been the result of an internal injury, may well have brought about a predisposition to appendicitis.

During the time that I knew him he was able to work continuously very little of the time, owing to his weakness and general debility.

At the time I first treated Omey E. Dyer he was totally disabled within the following definition:

> "Total disability is that condition of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation."

for the reasons already given. He also suffered from recurrent gastritis. The medicine I gave him seemed to improve him for short periods, and then he would relapse again. The man would take ill again with some new pain or ache.

He was stooped, but not lame. The stooping was caused by debility, weakness, and other difficulty, pain in his back and abdomen, and a general condition of exhaustion. The man was undernourished, he was thin and anemic and weak, and as a consequence his carriage was stooped.

CROSS EXAMINATION

By Mr. Rydalch.

I do not specialize in any branch of my profession,

but I am more of a surgeon than otherwise since eighty per cent of my work or income is surgical, which has entitled me to a fellowship in the American College of Surgeons since 1927.

Omey Dyer's first application for treatment from me was February 20. 1926. When he came to my office he was complaining of weakness, general debility and a highly nervous condition. Upon examination the patient had gingivitis, or an infected condition of the gums, of a serious nature. I gave him a complete physical examination which consisted of an inspection of the patient, and clinical observation of his entire body.

I found a marked anemia, evidences of malnutrition and underweight. Apart from sending him to a dentist to have the necks of his teeth scraped and polished and whatever local treatment the dentist was able to give, he was given arsenical preparations intravenously, namely, neo salvarsan and Ferric Cacodyllate.

This Neo Salvarsan was given to him as a specific for the type of gingivitis which appeared in the patient, that is, the type in which the streptothrix is present. That means that this condition of the gums is exuding a pus or poison, into the system, both by local absorption and by being taken into the alimentary tract, and this pus and poison going into the alimentary tract, sets up an inflammation or irritation, somewhere, and causes a man to get sick.

Appendicitis is caused by the localization of an in-

flammatory condition of the alimentary tract, by streptococci, staphylococci, but is more commonly introduced by a superactivity of the colon bacillus. Appendicitis may be caused by any trauma wherein through adhesions, a sluggish circulation is brought about through the alimentary canal or bowel tract, particularly in the neighborhood of the appendix.

In my experience, it is very uncommon that pyorrhea may be assigned as a cause of appendicitis. It is possible that it would set up an irritation in the alimentary canal that would bring on the acute appendicitis, but in my experience that has not been common.

It is unlikely that the type of pyrrohea or gingivitis may have been the cause of the incidence of acute appendictis in Mr. Dyer, and his later record show that the type of infection presented by Mr. Dyer will cause an attack of acute appendicitis, acute appendicitis being more commonly caused by an aggregation of unusual multiplication of the organisms before mentioned, streptococci, staphylococci and colon bacilli.

His nervous condition and his anemic appearance could have resulted from the bad condition of the gums and the inflamed appendix. The gingivitis was a sufficient cause. However, the fact that Mr. Dyer's history was one of rather long standing debility, it is unlikely if the pyorrhea was the entire cause of his systemic weakness. By history I mean what he told me.

I operated on Mr. Dyer for appendicitis August 2, 1926. Mr. Dyer entered the hospital July 28, 1926,

as the result of an accident while working for Gardner & Dyer on the highway near Fort Klamath, Oregon. The accident was one where Mr. Dyer had been thrown off a plank or scaffolding while attempting to wheel a wheelbarrow of concrete. While in the hospital, Mr. Dyer developed symptoms of appendicitis, necessitating the operation of August 2, 1926.

Aside from superficial cuts and bruises, the patient had a sprained shoulder and back as a result of this accident. The usual examination was made for internal injuries. My recollection is that he fell a distance of about six feet off this scaffold.

When I operated I found very extensive adhesions. I left these alone. I tried not to bring about any more than already existed, since no vicious bands of adhesions were present—that means immediately troublesome. They were not of such importance that I had to operate. The adhesions were of long standing and could not have resulted from the fall with the concrete.

General systemic debility prevented him from going back and working the same as he had before this injury by falling off the scaffold. The man was highly nervous, restless, sleepless and could stand no physical exertion. Apparently the physical condition of Mr. Dyer prohibited his working at physical labor and his general nervous condition would not permit him to undertake mental effort of any consequential kind—that is, permit him to work at any gainful occupation. It is a fact that he drew several months compensation from the

Mutual Benefit & Health & Accident Association, at that time. I cannot recollect when I last treated Mr. Dyer, or examined him.

I never saw Mr. Dyer when he was capable of any sustained effort either mental or physical on account of his general physical weakness as evidenced by anemia, accompanied by rapid, weak pulse. His condition improved, but not sufficient to permit his return to any useful work. He was very conscientious in following any directions given him.

"Q. Doctor, don't you think that this fall off the scaffold had about as much to do with his condition after that, as anything, regardless of what he told you of his history?

A. No, I do not. Mr. Dyer should never have attempted physical labor."

Mr. Dyer had had acute appendicitis arising after nearly a week's rest in a hospital. It is a likely supposition that this period of enforced rest incidental to his injuries, supplemented the already sluggish condition of his bowel activity and encouraged the acute attack of appendicitis.

"Q. How long prior to this hospitalization, Doctor, would you say that he shouldn't have followed this hard manual labor?

A. Never in my acquaintance with the man."

It is true that his attempt to wheel a wheelbarrow of concrete was beyond his ability, but just what he might have applied his energies to in any sustained

way, I do not know. From the time of his application at my office he was never capable of prolonged effort; I am not sure whether I took any x-ray picture.

"Q. You stated, doctor, didn't you, that he claimed he had been run over by a truck at one time?

A. Yes.

Q. Well, if you didn't make a check on those alleged traumatic injuries, wasn't it your opinion that this acute appendicitis was caused from some inflammatory condition, and not resulting from any trauma either old or when he fell off the scaffold?

A. The appendicitis was the result of a localization of a general infection of the alimentary tract, superinduced by a sluggish circulation through that portion of the bowel, and very likely contributed to by the patient's enforced rest in bed."

REDIRECT EXAMINATION

By Mr. Stone.

Pyorrhea is more likely to attack a person of low vitality than it is a healthy person.

This general systemic debility continued after the operation for appendicitis. And this condition of systemic debility continued after the operation for appendicitis; he did not seem to improve generally in a satisfactory way, after the operation, although the operation in which the appendix was removed healed kindly.

DR. J. O. HAMPTON, a witness called on behalf of the plaintiff, after having been first duly sworn, on oath testified as follows:

DIRECT EXAMINATION

By Mr. Worthwine.

My name is J. O. Hampton. I am a physician and surgeon by profession. I am practicing at Blackfoot.

"Q. How long have you been engaged in the practice of your profession?

MR. GRIFFIN: His qualifications will be admitted, Mr. Worthwine."

I was acquainted with Omey E. Dyer during his lifetime. The first time I saw him was on the 28th day of July, 1919, I believe. He came to my office as a patient for treatment, for examination and treatment. The relationship of physician and patient existed between himself and myself at that time. That was the first time that I saw him, when he came to my office. I saw him the first time on the 28th day of July and I saw him quite often off and on during that year, and quite often after that, I believe it was up to about 1921.

I saw him again in 1927. I saw him at different times during 1927 and 1928, up until. in fact, I sent him to Boise at the hospital.

At the time of my treatment of him in 1919, I took a history from Mr. Dyer. He gave a history of being injured in France, run over by a truck through here

(indicating), over the stomach that way (indicating).

"Q. What was the trouble with him. Just tell the jury what you found at the time you examined him and treated him in 1919 and 1921?

A. Well, he came to my office. He was weak and in a debilitated condition. In fact, very anemic and very thin, and he walked in a stooped position, complaining of a good deal of pain in the stomach and epigastric region and back. He vomited, you might say, incessantly. Everything he ate at that time he vomited, couldn't retain anything on his stomach.

Q. What, in your opinion, was the cause of this condition that you found?

A. I made a physical examination, went over him as carefully as I could and found that he had what we call a gastroptosis, a dropping down of the stomach and intestines.

Q. What was the effect on Mr. Dyer of that dropping down of the stomach and intestines?

A. It was as I repeated before, just those symptoms that I gave you—is what is, in my estimation, that injury and that dropping of the stomach caused those symptoms.

Q. How did that affect his digestion? What was the cause of the vomiting, Doctor?

A. The stomach dropped down there, and of course the digestion is poor—in fact, there isn't any; just lays there and doesn't digest, gets sour and putrid. There is no peristaltic action to speak of and after awhile it

gets sour and is ejected from the stomach, vomited up.

Q. And would being run over by a truck, in your opinion, as he gave you in his history, be sufficient to cause that condition?

A. Yes.

Q. In your opinion did it cause it?

A. Yes.

Q. Doctor, I will ask you to state whether or not in your opinion, Omey E. Dyer was totally and permanently disabled at the time you saw him in 1919, within the following definition: Total disability is that condition of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation, and total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue through the life of the person suffering from it?

A. Yes, sir. He was totally disabled. In my estimation he was totally disabled.

Q. Was he permanently disabled?

A. Total and permanent, in my estimation.

Q. Did you treat him in 1927 and 1928?

A. Yes.

Q. Did you prescribe for him?

A. Yes.

Q. And you were his attending—were you his attending physician during that period of 1927 and 1928?

A. I don't know whether there was any other physician saw him or not, but I did quite often.

Q. I will ask you to state whether or not—from what he was suffering at that time, what was it you found?

A. The same condition that I found the first time I examined him, only it was aggravated worse.

Q. I will ask you to state whether or not when you examined him, or treated him, in 1927 and 1928, he was totally disabled within the meaning of the definition of total disability, total disability being defined as that condition of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation?

A. Yes, sir.

Q. And was his condition such that—I will ask you whether or not he was permanently disabled, or not, at the time?

A. I consider so.

Q. And within the definition was he totally and permanently disabled in your opinion?

A. Yes.

Q. And in your opinion was the injury by the truck the cause of his condition at that time, in 1927 and 1928?

A. Yes.

Q. Doctor, I will ask you to assume the following facts: That prior to the war, or upon the fifth day of August, 1918, Omey E. Dyer entered the United States

Army, and that he was seen in France in November, 1918, by one of the witnesses in this case; that another of the witnesses saw him in the hospital at Fort Douglas down at Salt Lake beginning in February, 1919, and that he remained in that hospital for about two months; and that he was discharged on the twenty-fifth day of April, 1919; that at the time he was in the hospital at Camp Logan, or rather, at Fort Douglas at Salt Lake he was seen by a witness to be coming out from under the influence of ether, that thereafter and before he left he walked sometimes with crutches and sometimes with a cane and was seen to limp; that he returned to Blackfoot in April or May, 1919, and when he arrived in Blackfoot, or after his arrival in Blackfoot at that time in 1919 he was walking with a cane; that he appeared thin and pale, and complained of pains in his back, and that he had a history of vomiting from the time of his, about the time of his return from the United States army up until the time he left for the hospital in 1928, and that he died in the Boise hospital on May 1st, 1929, I will ask you—and you can assume that he attempted some jobs about his father's place in 1919 and again in 1928 and 1929; one of the jobs he attempted in 1919 was to help put up some hay and he lasted about an hour and a half when he left the work and went to the house; that on the fourteenth day of July he went to work under Mr. Wesley C. Thompson and he worked then until Wesley C. Thompson took him from his work to your office at the time

you came in contact with him, and that he worked from time to time for Bingham County and some for a man by the name of Clark, I believe, up in Bonneville County up until some time in 1921, during which time you were seeing him as you testified from time to time; that about 1921 he left Idaho and went to Oregon; that he became associated with one John A. Gardner in the contracting business; that Mr. Gardner was with him from some time in August, 1919 until 1927 or 1928, and that during that time the witnesses saw him, one of the witnesses estimating he was sick in bed or in the hospital, a year and another eighteen months, and witnesses have estimated he was off his work one fourth to half the time until he came back to Idaho when you saw him; and that the testimony is that during the year 1923 to 1927 he and Mr. Gardner while engaged in contract work, that the partnership made about four thousand dollars a year, and that Mr. Dyer was paid one-half of it; the evidence of one of the witnesses is that—one of the general contractors who were letting subcontracts to Mr. Gardner and to Mr. Dyer was that were it not for Mr. Gardner he wouldn't have given them any contracts, and Mr. Dunn, the general contractor who let the contract to Mr. Gardner and Mr. Dyer, testified that during the time he knew him from 1923 to 1927 he had—he walked a little over sideways and pulled to one side like he was in misery, and that he was sometimes worse than others, and that he was never in good health from the time Mr. Dunn knew

him, that he complained of his stomach, that he was a cantankerous man and that Mr. Dunn never cared for him, probably that was on account of his physical condition, that he seemed to be looking for a quarrel, and his face was drawn and he sometimes looked like a corpse; that he never could stand very much physical work, and he wasn't on the work all the time but his partner was, and that it was on account of his partner that the contract was kept; and that he tired easily on exertion and couldn't stand but just a little work; that he was off the job quite often and always sick, kept growing gradually worse after he went to work, and his estimate is that he worked half of the time, probably a little more or a little less, that he did some physical labor but he couldn't do it continuously; that his partner Mr. Gardner handled the men principally and did all of the work when he, Mr. Dyer, was not there, and looked after the job and business in a general way; and you can assume in 1926 he came to Dr. Warren C. Hunt, who testified in this case; that he found Mr. Dyer suffering from adhesions and general debility, and that he operated him some time in August, 1926, for appendicitis, and while he recovered from the appendicitis, that his condition was marked anemic and evidence of malnutrition and underweight continued, and the doctor testified he gave him—or prescribed for him certain specifics for his condition; and assuming the facts, Doctor, that you have testified to that you found yourself during these two periods of time that you examined

and treated Mr. Dyer, I will ask you to state whether or not, in your opinion, within the definition of total and permanent disability, that we have used here, which is that total disability is that condition of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation, and total disability shall be deemed to be permanent whenever it is founded upon conditions which make it reasonably certain it will continue throughout the life of the person suffering from it, whether, in your opinion, within that definition Mr. Dyer was totally and permanently disabled at the time of his discharge from the United States army on the twenty-fifth day of April, 1919?

MR. GRIFFIN: Just a moment. That is objected to, your Honor, because it takes into consideration the doctor's own diagnosis which was based upon a history not proven, that he was run over by a truck and it also omits the findings of Dr. Hunt in 1926 which show a principal condition of pyorrhea, and shows no findings of a dropped stomach or gastroptosis—is that it, Doctor?

A. Gastroptosis.

MR. GRIFFIN: It omits reference to the fact that this man was earning sixty-five cents per hour in 1919, and seventy-five cents an hour part of the time, being from fifteen to twenty cents an hour more than the other men were earning, and such record as we have shows he was working nine hours a day. It omits the

fact that in 1920 he was earning seventy-five to sixty-five cents an hour doing work as foreman in cement contracting work; it omits the fact Mr. Dunn says he saw him every day and never saw him vomit from 1923 to 1928; it omits the fact that in 1926 he fell from a scaffold while wheeling a wheelbarrow of cement and was injured in his back and shoulders; it omits the fact Mr. Gardner, his partner, first saw him have a spell in 1923, and two others up to 1927. I think that is all, your Honor, that he earned two thousand dollars a year working for the period of time—during that period that Mr. Dunn said he was working and Mr. Gardner said he was working, nevertheless his income was two thousand dollars a year from 1923 to 1927, inclusive.

MR. WORTHWINE: I stated, I think, that the testimony was as to that earning, that it was paid to him for the partnership, I included that in my question, your Honor.

THE COURT: What do you say to the other objections?

MR. WORTHWINE: They may be incorporated.

Q. (Mr. Worthwine.) Doctor, did you hear Mr. Griffin's statement of facts that should be added—that Mr. Griffin the attorney just made?

A. Yes, sir.

THE COURT: You also objected to the doctor assuming some facts that he received at the time he made the examination that was not in evidence. Counsel objects to that.

MR. WORTHWINE: That is in evidence, that is part of it because—

THE COURT: Counsel says it isn't.

MR. GRIFFIN: There is no evidence of that except the doctor said this man told him.

MR. WORTHWINE: That was given to him.

MR. GRIFFIN: That isn't—there is no proof of that. There is no proof that he was ever run over at any time by a truck. He told the doctor he was but that doesn't make it proof of the fact. It is admissible for the doctor to state that because it is history but that doesn't make—but before the doctor can give his opinion based upon that, outside of his treatment, it must be proven as a fact in the case. The mere fact that the man told him he had been so is no proof that he had been in fact, and the very basis of your opinion falls when you haven't proof of the fact.

MR. WORTHWINE: There is evidence in the record unobjected to that he was run over by a truck.

THE COURT: Where, point it out?

MR. WORTHWINE: Why the history he gave Dr. Hunt your Honor.

MR. GRIFFIN: It is just history, nothing but hearsay history given to the doctor for the purpose of diagnosis. That doesn't prove it as a fact.

THE COURT: That doesn't prove it occurred, just because he stated it occurred.

MR. WORTHWINE: Well, if your Honor

please, when a fact is in evidence it is in evidence for all purposes.

MR. GRIFFIN: It is permitted in evidence—peculiarly in the case of a doctor's testimony it is admitted, not because it is true, or not because it is assumed to be true, but because the doctor is entitled to give his diagnosis based on what the patient told him, as well as his physical findings but that doesn't mean in a law suit that it is any proof at all of the fact that he was run over. It is merely proof of the fact he told the doctor that he was run over.

THE COURT: That is as far as it could go. There is no proof here that he was run over by a truck. Unless you can show that there is some evidence here, other than the statement of Mr. Dyer.

MR. WORTHWINE: It is in evidence unobjected to, if your Honor please.

THE COURT: How.

MR. WORTHWINE: It is given in the history —given to Dr. Hunt, there is no objection to it.

MR. GRIFFIN: We did object to it, as a matter of fact, and your Honor ruled it was history and couldn't be objected to.

MR. WORTHWINE: I take it, your Honor, when a fact is in evidence it is in evidence for all purposes. Your Honor, the situation is this: We don't have, although a long time ago we made demand for it, the official record of this man while in the army. That has not been supplied and of course the man it

happened to is dead, and we have—it is in evidence as a part of this man's history. Why is that admissible? Because of this theory: When the man went to the doctor—and it is an exception to the hearsay rule—for treatment and not for testimony, of course that was in the mind of neither of them, having the doctor testify, that he told him the truth. That has the presumption of truth just the same as any other exception to the hearsay rule and it is in evidence, and that is a fact that the doctor has a right to take into consideration. It is one of the facts in the case. We would not have to have in this case now what counsel is contending, that we would have to have somebody that saw this man injured. That is what he has in mind. That isn't it at all. The statement has verity because it was given to the doctor—to the two of them, for that matter—when they were seeking treatment and that is all, that is why we have a right to assume that that fact exists.

THE COURT: As I understand the question, the difficulty here is that in this question you made the statement that this actually occurred, whereas, if you would modify your question—

MR. WORTHWINE: Yes, your Honor, I will do that.

THE COURT: Here you should limit it to what the patient told the doctor. The history of the case, based on that and not as a fact that has been established in the case by proof.

MR. GRIFFIN: May I make this suggestion,

your Honor: He is asking a hypothetical question, he is not asking this doctor what he found or anything he knows. He is asking for his opinion and he is stating as an assumed fact in that opinion, not only certain things but—

THE COURT: I think I can save time with this witness. Before he can answer, you will have to modify the question in this way: The doctor may assume the patient, if he did give a history to him, included in his history that he met with an accident and that a truck ran over him. That he told the doctor that, not that it has been proven, and he may consider it in that way, as a part of the history in the case he gave to the doctor, if he did state to the doctor that he was run over by a truck in the service in France, but not to assume the fact that has been proven other than what the patient told you as a part of the history of the case. With that modification I will permit him to answer.

Q. (Mr. Worthwine.) Now doctor, do you understand the question?

A. Yes, sir.

Q. You are not to assume as an actual absolute fact that he was run over by a truck, but you can assume that he gave you the history of it?

A. And answer on the history he gave me?

THE COURT: Yes.

A. I do.

Q. (Mr. Worthwine.) You say you do—

MR. GRIFFIN: With that modification may I have the same objection, your Honor, so I may preserve my record?

THE COURT: Yes you can have the same objection and it is overruled.

Q. You say you do. You say he was totally and permanently disabled at the time of his discharge, within that definition?

A. Yes, sir.

Q. And what in your opinion was the cause of his total and permanent disability?

A. According to his history, what he gave me, as being crushed by the truck.

Q. And what evidences, doctor, of an injury of some kind did you find?

A. In giving him a thorough examination I found his stomach and intestines down low, down in the hypogastric region.

Q. In your opinion was that caused by some injury?

A. Yes sir—it was exaggerated more than a common type of gastro-enteroptosis.

Q. How far down in your opinion was the stomach?

A. Down in the hypogastrium—down below where it belongs.

Q. Doctor in your opinion, under this history I have read is it your opinion he continued to be totally and permanently disabled up to the time of his death?

A. Yes.

Q. And the cause of that continuance was the same thing?

A. Yes, the same thing.

Q. Doctor what in your opinion, in the history I gave including his working, what was the effect on Omey E. Dyer, of his attempts to carry on the work he did?

A. I beg your pardon?

Q. What was the effect on his health?

A. If he tried work it made this condition worse. Any mental or physical work of any kind would aggravate the condition.

Q. What would be the effect, in your opinion, of his walking and moving around?

A. The extent. It would bring on this condition again, this vomiting and pain.

MR. WORTHWINE: You may cross examine.

CROSS EXAMINATION

By Mr. Griffin.

Q. You date this trouble then, from this supposed being run over by a truck, whenever that happened?

A. According to his history.

Q. That is what you date it from in your opinion?

A. I haven't any other way of dating it.

Q. And you don't know when it happened?

A. No sir.

Q. And you don't know whether it ever happened, do you?

A. Only according to his own statement.

Q. And you are simply assuming that is a fact?

A. Yes.

Q. And your whole opinion is based upon that being a fact, in fact?

A. On his history and my examination.

Q. Yes, that is a material factor is it not, in your determination you made an answer to this hypothetical question?

A. That is the way I take it.

Q. And if it was out of the question and wasn't a fact and hasn't been proved as a fact, then there wouldn't be any way for you to date when the trouble started, would there?

A. I wouldn't give any date.

Q. No. And you don't know what he was down there in the hospital at Fort Douglas for, do you?

A. I didn't know he was there, sir, before he came to me.

Q. You don't know whether they found any condition such as you found, or didn't find any such condition do you?

A. No sir.

Q. You are not interested in what their findings might be in order to make up your mind?

A. Yes, I am interested in the other doctor's findings, yes.

Q. You don't think you need it though?

A. How is that?

Q. You don't think you need it?

A. We all need help, we doctors.

Q. Well Doctor, what did you do for this condition you found here in July, 1919?

A. When I found this—when he came to my office?

Q. Yes?

A. I put him on a light diet, very little liquids, and used a belt.

Q. Yes?

A. An elastic belt to hold up his stomach.

Q. What did you do that for?

A. Why did I do it?

Q. Yes?

A. That was a proper method of treatment in my estimation.

Q. What would be the result of that treatment? What did you expect to attain with that?

A. Temporary relief.

Q. What did you do for permanent relief?

A. I didn't consider there would be any permanent relief in that man's condition.

Q. You thought he would always suffer from gastroptosis?

A. Or gastro-enteroptosis, either one.

Q. Which did you think he had?

A. He had both.

Q. He had both?

A. Yes sir.

Q. When you gave him this belt, what was the effect?

A. Temporary relief when he would wear it and lay off work.

Q. He wore it and worked, as a matter of fact, didn't he?

A. Some, I think.

Q. You knew what kind of work he was doing, didn't you?

A. Some of the time, yes.

Q. What kind of work was he doing?

A. As has been stated here he was working—I don't think he was doing any heavy work or anything of that kind—just around working—some for the county, I think. Of course it was none of my business what he was working at.

Q. You knew during the time you were treating him that in fact he was working?

A. Yes; and I tried to keep him from it.

Q. But he continued to work did he?

A. Some of the time.

Q. Did you consider at that time sixty-five cents an hour for nine hours a day was a gainful occupation.

A. I didn't know what he was getting at all.

Q. Would you consider that as a gainful occupation?

A. Yes if steady I would.

Q. Would you consider seventy-five cents an hour a gainful occupation?

A. Yes, I would.

Q. And if the testimony is here that he worked during the season of 1919, after July 14th, after being out about a week while you were treating him, he came back in August after about a week and continued to work at sixty-five cents an hour, that he was recommended by his employer at that time as competent and able to carry on the work of general foreman for cement work, culvert building,—I mean form work, form building, that he was hired by another man as general foreman, and continued in that man's employ up until some time in 1920 I believe, and then returned to the first man who employed him again at sixty-five cents an hour up until March or April, 1921, and that this man was working about the same times the general foreman who employed him worked, and it was work in the winter, would you consider he had been following a gainful occupation?

A. Part of the time yes.

Q. And then, doctor, if you assume after he left Idaho in the spring of 1921 that he went over to Oregon where he was foreman under a contractor there in the same class of work, and continued that work in 1921, 1922 and 1923, went into a partnership of subcontracting of the same kind of work and from 1923—in 1923, 1924, 1925, 1926 and 1927 he was living in camps and the expenses would be taken out, the living

expenses would be taken out, and at the end of the year they would divide up, he and his partner, two thousand dollars for each of them during each of those years, would you consider he had been gainfully occupied?

A. Probably part of the time. If that was—if that was all of the time I would consider it so.

Q. Well let's assume he only worked half of the time, or less, but that as a result of the work he did do he earned two thousand dollars plus some of his living expenses, do you think he would be in a gainful occupation?

A. To a certain extent, yes.

Q. What do you mean by a certain extent, doctor?

A. Well, he only worked part of the time. Of course that was after my time taking care of him, and I don't know anything about that.

Q. But you have been testifying on this history that has been given. I want to get your idea of what you think gainful. Do you think if a man makes two thousand dollars a year and works only six months he has been engaged in a substantially gainful occupation?

A. That is out of my line.

Q. I want to get your reaction because you said he wasn't able to follow a gainful occupation. You must have some idea what a gainful occupation is?

A. I still say he shouldn't have. He is a man that had a lot of nerve and energy, and tried to do when he really wasn't able to do—when he should have been in bed.

Q. This is a condition which would increase, wouldn't it—get worse as time went on?

A. Yes.

Q. And finally reach a stage, would it, doctor, when of course a man would be flat on his back?

A. It leads into other things, a lot of complications.

Q. Now when you speak of total and permanent disability within this definition do you have in mind a man is totally and permanently disabled when the disease starts which results finally in—either in his death or in his inability to continue?

A. I didn't get that.

Q. Do you date his total disability within that definition from the date when a disease starts?

A. Date it from the time he is unable to work—perform.

Q. From the time he is unable to work. In fact, he did work at a gainful wage, well from 1919 to 1927, inclusive, each year, doesn't show that he was not totally and permanently disabled during those years, in your opinion?

A. It shows me, he should have been—just as I told you—I didn't think he should work at all.

Q. I am not asking you what he should have done. I am asking you what he did, whether in your opinion he was following a gainful occupation during those years?

A. I know nothing about it.

Q. You were the one who gave the answer a while

ago that he couldn't—that he was in your opinion totally and permanently disabled. Now I want to know why you say that in view of—

A. He came back to me in 1927 with the same condition existing, only worse, gradually getting worse, and I say from the time I saw him in 1919, then again in 1927, his condition was worse.

Q. That isn't what you did say. You said in answer to a question by Mr. Worthwine that in your opinion during all that time he was totally and permanently disabled, that is to say, he was in such a condition that he could not continuously follow any gainful occupation. That is what you said, didn't you?

A. Not "could not".

Q. Yes that is what you said, that he could not do it, despite his history. Isn't that what you said?

A. I said in my opinion he was totally and permanently disabled.

Q. What do you mean by totally and permanently disabled?

A. That he shouldn't work, and wasn't able to work, wasn't able to perform any duties, shouldn't be able to.

Q. You based that upon the assumed facts which Mr. Worthwine gave to you in his question, did you?

A. The history, yes.

Q. And that history included the actual following of a gainful occupation from 1919 to 1927, inclusive, didn't it?

A. Yes, sir.

Q. Now you ignore, as I understand it, in your opinion, you ignore the actual fact he did in fact follow a gainful occupation for that period of years?

MR. WORTHWINE: We object to that question, if your Honor please. That isn't the fact. We submit counsel should give the entire history as to his sickness and the amount of time he lost between those years, and the time he was sick and away from the work.

MR. GRIFFIN: I am asking about Mr. Worthwine's questions now, your Honor, and I am asking him what consideration he gave to the fact that this man did in fact follow a gainful occupation during those years. I have the right to ask what weight he gave to these different factors.

THE COURT: You can question him whether he took that into consideration.

MR. GRIFFIN: That is what I am doing, if your Honor please.

THE COURT: If he knows it to be a fact—of course he would probably have to assume it from what you embody in the question, unless he knows all of the facts during that period of time.

MR. GRIFFIN: That was in the history given him.

THE COURT: You may state to him what is in evidence, and then question him about it, that is, between those dates, between 1919 and 1927. Counsel can relate the facts that have been proven and ask him

to take that into consideration—if that would make any difference in forming his opinion.

MR. GRIFFIN: I will put it that way.

THE COURT: That is what counsel objects to.

MR. GRIFIN: All right.

Q. Assume Doctor, this man, beginning in July, July 14th, I think, 1919, went to work and worked nine hours a day up until the 28th day of July at sixty-five cents an hour, which was fifteen cents an hour more than the other men were getting; that he was engaged as a foreman in building forms for concrete, culverts and bridges on the highway; then that about a week after the 28th of July he returned to that work, worked during August in the same capacity at the same rate; that he was then recommended to another man for general foreman at seventy-five cents an hour; that he worked at that during the period until the fall of 1920 when there was work of that character to be done, in Bonneville County and partly in Bingham County; then that he returned to the first man and worked for him under him as a foreman in the same class of work at sixty-five cents an hour until the spring of 1921 when he went to Oregon, and was foreman there on concrete contracting until 1923 when he formed a partnership with Mr. Gardner, his brother-in-law, as subcontractors on concrete work on highway culverts and bridges, and that in 1923 he made two thousand dollars; in 1924, he made two thousand dollars; in 1925 he made two thousand dollars; in 1926 he made two thousand dollars, and in

1927 he made two thousand dollars, would that make any difference in your opinion as to whether during that period of time he was totally and permanently disabled?

MR. WORTHWINE: Now if your Honor please, we object to the question because it doesn't include all the facts. It doesn't include his sickness, or the time he was off work, and one of the facts counsel assumes is that he made that amount of money, when the evidence is that he was paid that from the partnership.

THE COURT: Does your hypothetical question cover the facts in this question?

MR. WORTHWINE: Yes, and a lot of others.

THE COURT: The doctor may take into consideration the facts in your question, and in counsel's question. Let him assume all that are in evidence. Counsel is asking now, would that make any difference in your opinion after considering the facts related by counsel for the plaintiff. You may consider both. Do you understand now?

A. Yes, sir. I think I do, your Honor.

THE COURT: You may answer.

A. It is quite a lot to digest. I consider the man, and still stay with it, consider that he was unable to work—disabled, totally and permanently disabled.

Q. You consider then, during that period of time—

A. Yes, sir.

Q. (Continuing.) That he was unable to follow continuously any substantially gainful occupation?

A. Yes, sir; I consider it so.

Q. During that period of time?

A. Yes.

Q. When you sent him to the Boise hospital, what did you send him over there for—to the Boise Veterans Hospital in 1928?

A. To see what they could do for him.

Q. You sent him over for a different condition you found, didn't you?

A. Beg pardon?

Q. You sent him over for a thyroid condition, didn't you?

A. No, sir.

Q. You made no diagnosis of a thyroid condition?

A. No, sir.

Q. Either in 1928 or 1929?

A. No.

Q. As a matter of fact he came back in 1929, early in 1929 to Blackfoot?

A. I don't remember—

Q. Wasn't he under your charge?

A. I made no diagnosis of a thyroid condition at all.

Q. Didn't you make any examination of him at that time, Doctor?

A. Yes, sir.

Q. All you found at that time was this gastro-enteroptosis?

A. That general condition of the stomach and bowels.

Q. When he came back from the hospital over to Blackfoot you didn't examine him again, then either?

A. No, sir.

Q. You didn't treat him during that time?

A. I saw him quite often at his home—relieved him the best I could.

MR. GRIFFIN: I think that is all.

MR. WORTHWINE: That is all, Dr. Hampton. We rest, your Honor.

MR. GRIFFIN: If your Honor please, if I could have five minutes, I think I could shorten this case very greatly.

THE COURT: Very well. We will be at ease for five minutes.

MR. GRIFFIN: (After intermission.) The Government will rest, if your Honor please. I will present this. (Paper handed to Court.) If your Honor desires us to present it, I would like to do it in the absence of the jury.

THE COURT: Gentlemen of the jury, I will excuse you for a few minutes. There is a matter here I have got to take up.

(Jury excused.)

THE COURT: Have you seen this motion, Mr. Worthwine?

MR. WORTHWINE: Yes I have your Honor.

THE COURT: I would like to hear you gentlemen on it.

MR. GRIFFIN: Reading:

"Comes now the defendant at the close of the evidence on behalf of the plaintiff, the plaintiff having rested and the defendant having rested, moves the Court to direct a verdict in favor of the defendant upon the ground that the evidence is insufficient to show that the insured became totally or permanently or totally and permanently disabled within the meaning of the insurance policy at a time when the policy was in full force and effect.

"2. That the evidence affirmatively shows that in fact the insured did follow continuously a gainful occupation subsequent to the lapse of the policy.

"3. That the evidence affirmatively shows that the insured followed a substantially gainful occupation during the years, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926 and 1927.

"4. That a verdict should be directed as to any payments claimed to accrue after May 1, 1929, the date of the death of the insured for the reason that the complaint does not plead any contract for the payment to beneficiary of any such payments after the death of the insured."

THE COURT: Gentlemen of the jury, in the view I have taken of the law of this case, I feel compelled to find—to instruct you to find a verdict for the defendant. As a rule, in giving such instruction I briefly explain to the jury why it has been done in order that they may not feel that the Court has acted arbitrarily. You will remember this is an action brought by plaintiff upon

a war risk insurance policy issued to him on August 5th, 1918, and was in force until midnight of May 31st, 1919. The law and the policy provide that in the event the insured became totally and permanently disabled during the life of the policy he would be entitled to recover the amount of the policy, and before such recovery could be had it is necessary for him to show that he, in fact, became totally and permanently disabled during the period from the time of the issuance of the policy to the time it elapsed, and it is a case where he predicates his cause of action upon the claim that he became totally and permanently disabled. My analysis of the testimony in this case is that the plaintiff has not show that he in fact became totally and permanently disabled between the date of the issuance of the policy until the time it elapsed, as required by the policy and the law; that there is no evidence, as I view it, at all upon which to predicate a verdict of the jury, or a decree of the Court.

You may go into your jury room and I will send in a form of verdict, which will be in favor of the defendant. You will understand, gentlemen, that you take no responsibility in a matter of this kind, and the entire responsibility is upon me for this verdict.

MR. WORTHWINE: May we have an exception to your Honor's instructions.

THE COURT: Yes. This verdict reads, "On instructions of the Court," so you will understand. You

may retire, gentlemen, to have your foreman sign the verdict.

WHEREUPON, the jury retired, and upon their return the following proceedings were had:

MR. WORTHWINE: May we have an exception to the filing of the verdict, if your Honor please.

THE COURT: Yes, you may have an exception.

WHEREUPON, the verdict was read by the Clerk, and the following proceedings had:

THE COURT: Gentlemen, you may be excused until tomorrow morning at nine-thirty. You got an order for time to prepare a bill of exceptions in this case?

MR. WORTHWINE: Yes, your Honor, sixty days.

(Title of Court and Cause.)

CERTIFICATE OF JUDGE TO BILL OF EXCEPTIONS.

STATE OF IDAHO, }
District of Idaho. } ss.

I, CHARLES C. CAVANAH, United States District Judge for the District of Idaho, and the Judge before whom the above entitled action was tried, to-wit, the cause entitled Charles E. Dyer, administrator of the estate of Omey E. Dyer, deceased, and Charles

E. Dyer, Plaintiffs, vs. United States of America, Defendant, which is No. 801 in the Eastern Division of said District Court,

DO HEREBY CERTIFY That the matters and proceedings embodied in the foregoing bill of exceptions are matters and proceedings occurring in said cause and the same are hereby made a part of the record therein; and that the above and foregoing bill of exceptions contains all the material facts, matters and proceedings heretofore occurring in said cause and not already a part of the record therein; and contains all the evidence oral and in writing therein, and is a true bill of exceptions, and that the above and foregoing bill of exceptions was duly and regularly filed with the Clerk of said Court, and thereafter duly and regularly served within the time authorized by law, and that no amendments were proposed to said bill of exceptions except such as are embodied therein, and that due and regular notice for settlement and certifying said bill of exceptions was given.

Dated at Moscow, Idaho, this 12th day of May, 1932.

CHARLES C. CAVANAH,
District Judge.

Service of the foregoing bill of exceptions and receipt of a copy is hereby acknowledged and accepted this 6th day of May, 1932.

H. E. RAY,
United States Attorney,

SAM S. GRIFFIN,
Assistant U. S. Attorney,
Attorneys for Defendant.

(Title of Court and Cause.)

PETITION FOR APPEAL.

Filed May 12, 1932.

The above named plaintiffs, Charles E. Dyer, administrator of the estate of Omey E. Dyer, deceased, and Charles E. Dyer, conceiving themselves to be aggrieved by the orders and rulings made in the above entitled cause on the trial thereof on March 9, 1932, and by the judgment filed and entered on the 10th day of March, 1932, in the above entitled cause and proceeding, does hereby appeal from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, for the reason and upon the grounds specified in the assignment of errors filed herewith and pray that their appeal may be allowed, that a citation issue as provided by law, and that a transcript of the records, proceedings, exhibits and papers upon which said judgment was entered as aforesaid, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, and these plaintiffs pray for an

order fixing the bond which the plaintiffs shall give to secure to defendant the payment of costs if said plaintiffs should fail to sustain their contention in said appeal.

Dated this 12th day of May, 1932.

EARL W. CORY,
Residence: Blackfoot, Idaho,
HAWLEY & WORTHWINE,
Residence: Boise, Idaho,
Attorneys for Plaintiffs.

(Service acknowledged.)

(Title of Court and Cause.)

ASSIGNMENTS OF ERROR

Filed May 12, 1932.

The above-named plaintiff files this as his assignments of error, and contends that the trial court erred in the following particulars in the trial of said cause:

I.

That the trial court erred in ruling and holding that the defendant was entitled to a directed verdict in its favor, and in directing the verdict in favor of the defendant.

II.

That the trial court erred in instructing the jury as follows:

"Gentlemen of the jury, in the view I have taken of the law of this case, I feel compelled to find —to instruct you to find a verdict for the defendant. As a rule, in giving such instruction I briefly explain to the jury why it has been done in order that they may not feel that the Court has acted arbitrarily. You will remember this is an action brought by plaintiff upon a war risk insurance policy issued to him on August 5, 1918, and was in force until midnight of May 31, 1919. The law and the policy provide that in the event the insured became totally and permanently disabled during the life of the policy he would be entitled to recover the amount of the policy, and before such recovery could be had it is necessary for him to show that he, in fact, became totally and permanently disabled during the period from the time of the issuance of the policy to the time it lapsed, and it is a case where he predicates his cause of action upon the claim that he became totally and permanently disabled. My analysis of the testimony in this case is that the plaintiff has not shown that he in fact became totally and permanently disabled between the date of the issuance of the policy until the time it lapsed, as required by the policy and the law; that there is no evidence, as I view it, at all upon which to predicate a verdict of the jury, or a decree of the court. You may go into your jury room and I will send in a form of verdict,

which will be in favor of the defendant. You will understand, gentlemen, that you take no responsibility in a matter of this kind, and the entire responsibility is upon me for this verdict."

III.

That the trial court erred in receiving and filing the verdict.

IV.

That the trial court erred in sustaining the motion to strike part of the testimony of Charles E. Dyer, the father of Omey E. Dyer, and in ruling as follows:

"Q. Did he work?

A. He helped around with me. He wasn't able to go on.

MR. GRIFFIN: Just a minute. I move to strike 'He wasn't able to go on' as a conclusion.

THE COURT: It may be stricken."

V.

That the trial court erred in ruling and holding that part of the testimony of the witness, A. T. Springer, should be stricken, when the following proceedings were had:

"Q. (By attorney for the plaintiff.) Now tell us the facts, Mr. Springer, what you observed about Omey E. Dyer at that time. Don't state any conclusions.

A. He was either on crutches or had a cane, I don't remember which to the best of my recollec-

tion. He was much lighter in weight than he was when I saw him before he went to the army, his complexion was bad, and he looked like a sick man.

MR. GRIFFIN: I move to strike 'he looked like a sick man' as a conclusion of the witness.

THE COURT: It may be stricken.

MR. GRIFFIN: And the jury be instructed not to regard it.

THE COURT: The jury understands that when any testimony is stricken by the Court they are not to consider it."

VI.

That the trial court erred in sustaining the objection of the testimony of the witness, John A. Gardner:

"Q. What was his color, was it healthful, or otherwise, after he got out of the army?

MR. RYDALCH: Object to the question as a conclusion.

THE COURT: Sustained."

VII.

That the trial court erred in sustaining the objection of the defendant to the testimony of Beulah E. Gardner as to the appearance of Omey E. Dyer, in the following particulars:

"Q. Did he appear to be a sick man or a well man?

MR. RYDALCH: Object to that question as leading, and furthermore as conclusion of the

witness. She could state how he appeared to her.
THE COURT: Sustained."

Dated this 12th day of May, 1932.

EARL W. CORY,
Residence: Blackfoot, Idaho,
HAWLEY & WORTHWINE,
Residence: Boise, Idaho,
Attorneys for Plaintiff.

(Service acknowledged.)

(Title of Court and Cause.)

ORDER ALLOWING APPEAL.

Filed May 12, 1932.

Upon the motion of the plaintiffs, appearing by their attorneys, Earl W. Cory and Messrs. Hawley & Worthwine, IT IS ORDERED that the appeal of the plaintiffs above named be allowed as prayed for by the plaintiffs in said cause.

AND IT IS FURTHER ORDERED that the amount of the bond be fixed in the sum of Five Hundred ($500.00) Dollars as security for defendant's costs on appeal, and it is so ordered.

IT IS FURTHER ORDERED That a transcript of the record be forthwith transmitted to the

United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California.

Dated this 12th day of May, 1932.

CHARLES C. CAVANAH,
Judge.

(Service acknowledged.)

(Title of Court and Cause.)

UNDERTAKING ON APPEAL.

Filed May 12, 1932.

KNOW ALL MEN BY THESE PRESENTS, That we, Charles E. Dyer, administrator of the estate of Omey E. Dyer, deceased, and Charles E. Dyer, individually, as principals, and The Fidelity and Casualty Company of New York, a corporation, as surety, are firmly held and bound unto the United States of America in the sum of Five Hundred Dollars ($500.00), to which payment well and truly to be made we bind ourselves, and each of us, jointly and severally, our heirs, executors and assigns.

WHEREAS, The plaintiffs in the above entitled cause have appealed to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, from a judgment rendered in the District Court of the United States, for the District of Idaho, Eastern Division, which judgment was made and en-

tered on the 10th day of March, 1932, wherein and whereby Charles E. Dyer, administrator of the estate of Omey E. Dyer, deceased, and Charles E. Dyer were plaintiffs and the United States of America was defendant.

NOW, THEREFORE, The condition of the above obligation is such that if the said Charles E. Dyer, administrator of the estate of Omey E. Dyer, deceased, and Charles E. Dyer shall prosecute said appeal to effect and answer all costs if he fails to make good his plea, then the obligation shall be void, otherwise to remain in full force and effect.

Dated this 12th day of May, 1932.

CHARLES E. DYER,
Administrator of the Estate
of Omey E. Dyer, Deceased.

CHARLES E. DYER,

Principals.

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK,
a corporation,
By CHAS. W. MACK,
Attorney-in-Fact,

(Seal) *Surety.*

Countersigned by
CHAS. W. MACK,
General Agent.

The foregoing bond is hereby approved this 12th day of May, 1932.

CHARLES C. CAVANAH,
Judge.

Service of the within and foregoing bond is hereby accepted this 12th day of May, 1932.

H. E. RAY,
United States Attorney.
SAM S. GRIFFIN,
Assistant U. S. Attorney.

(Title of Court and Cause.)

PRAECIPE FOR APPEAL.

Filed May 12, 1932.

To the Clerk of the District Court of the United States, for the District of Idaho:

Sir:

You will kindly prepare and transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, a properly authenticated record of appeal in the above entitled cause, including therein the following documents:

(a) Complaint.
(b) Answer.
(c) Motion for directed verdict.

(d) Minutes of the court of proceedings on March 9, 1932.

(e) Verdict.

(f) Judgment on verdict.

(g) Bill of exceptions.

(h) Stipulation.

(i) Petition for appeal.

(j) Assignment of errors.

(k) Order allowing appeal.

(l) Citation.

(m) Undertaking on appeal.

(n) Praecipe for appeal.

(o) Demand for production of papers at trial.

(p) Any other file, paper or assignment required to be incorporated in the transcript of record herein under the practice of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 12th day of May, 1932.

EARL W. CORY,
Residence: Blackfoot, Idaho.
and
HAWLEY & WORTHWINE,
Residence: Boise, Idaho,

Attorneys for Plaintiffs.

Service accepted this 12th day of May, 1932.

H. E. RAY.
SAM S. GRIFFIN.

(Title of Court and Cause.)

STIPULATION.

Filed May 12, 1932.

IT IS HEREBY STIPULATED By and between H. E. Ray, United States Attorney for the District of Idaho, and SAM S. GRIFFIN, Assistant United States Attorney for the District of Idaho, attorneys of record for the appellee, and EARL W. CORY and HAWLEY & WORTHWINE, attorneys of record for the appellant, that in printing the abstract of record in the above entitled cause that all titles of papers, acceptances of service and verifications may be omitted save and except that the complaint shall bear the title of said cause.

Dated this 12th day of May, 1932.

H. E. RAY,
United States Attorney
for District of Idaho.

SAM S. GRIFFIN,
Assistant U. S. Attorney
for District of Idaho,
Attorneys for Appellee.

EARL W. CORY,
Residence: Blackfoot, Idaho.

HAWLEY & WORTHWINE,
Residence: Boise, Idaho,
Attorneys for Appellant.

(Title of Court and Cause.)

CITATION ON APPEAL.

Filed May 12, 1932.

The President of the United States

To the United States of America, and H. E. Ray, Wm. H. Langroise, Sam S. Griffin and Ralph R. Breshears, Its Attorneys, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held in the City of San Francisco, State of California, within thirty days from the date of this writ, pursuant to appeal filed in the Clerk's office of the District Court of the United States, for the District of Idaho, Eastern Division, wherein Charles E. Dyer, administrator of the estate of Omey E. Dyer, deceased, and Charles E. Dyer are plaintiffs, and you are defendant, to show cause, if any there be, why the judgment in said appeal mentioned should not be corrected and speedy justice should not be done to the parties in this behalf.

WITNESS The Hon. Charles Evans Hughes, Chief Justice of the Supreme Court of the United States of America, this 12th day of May, 1932.

CHARLES C. CAVANAH,
United States District Judge
for District of Idaho,
Eastern Division.

W. D. McREYNOLDS,
Clerk.

(Seal)

Service accepted this 12th day of May, 1932.

H. E. RAY
SAM S. GRIFFIN,
U. S. Atty.

(Title of Court and Cause.)

CLERK'S CERTIFICATE

I, W. D. McREYNOLDS, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 114 inclusive, to be full, true and correct copies of the pleadings and proceedings in the above entitled cause, and that the same together constitute the transcript of the record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit, as requested by the Praecipe filed herein.

I further certify that the cost of the record herein amounts to the sum of $139.45 and that the same has been paid by the appellant.

Witness my hand and the seal of said Court this 7th day of June, 1932.

(Seal) W. D. McREYNOLDS, Clerk.

No. 6883

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CHARLES E. DYER, Administrator of the Estate of OMEY E. DYER, Deceased, and CHARLES E. DYER, *Appellants,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

16

BRIEF OF APPELLANT

Upon Appeal from the United States District Court for the District of Idaho, Eastern Division

HON. CHARLES C. CAVANAH, *District Judge*

HAWLEY & WORTHWINE,
OSCAR W. WORTHWINE,
JESS HAWLEY,
Attorneys for Appellant,
Residence: Boise, Idaho.

H. E. RAY,
U. S. District Attorney;
W. H. LANGROISE,
Assistant U. S. Attorney;
SAM S. GRIFFIN,
Assistant U. S. Attorney;
RALPH R. BRESHEARS,
Assistant U. S. Attorney,
Attorneys for Appellee,
Residence: Boise, Idaho.

Filed ..... FILED ....., 1932.

..... JUL 11 1932 ....., Clerk.

PAUL P. O'BRIEN,
CLERK

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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CHARLES E. DYER, Administrator of the Estate of OMEY E. DYER, Deceased, and CHARLES E. DYER, *Appellants,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

BRIEF OF APPELLANT

Upon Appeal from the United States District Court for the District of Idaho, Eastern Division

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HON. CHARLES C. CAVANAH, *District Judge*

HAWLEY & WORTHWINE,
OSCAR W. WORTHWINE,
JESS HAWLEY,
Attorneys for Appellant,
Residence: Boise, Idaho.
H. E. RAY,
U. S. District Attorney;
W. H. LANGROISE,
Assistant U. S. Attorney;
SAM S. GRIFFIN,
Assistant U. S. Attorney;
RALPH R. BRESHEARS,
Assistant U. S. Attorney,
Attorneys for Appellee,
Residence: Boise, Idaho.

Filed ....., 1932.

....., Clerk.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CHARLES E. DYER, Administrator of the Estate of OMEY E. DYER, Deceased, and CHARLES E. DYER,

Appellants

vs.

UNITED STATES OF AMERICA,

Appellee

BRIEF OF APPELLANT

Upon Appeal from the United States District Court for the District of Idaho, Eastern Division

---

HON. CHARLES C. CAVANAH, *District Judge*

STATEMENT OF THE CASE

Omey E. Dyer, the veteran whose insurance is involved in this case worked as much as he could and died. But all the work he did was against the advice of his physicians. (Ts. 86).

> "To say that the man who works, and dies, is as a matter of law precluded from recovery under the policy, but that one who following the advice of his physician refrains from such work, and lives, is entitled to recovery, presents an untenable theory of law and fact, and emphasizes the necessity for a determination upon the facts in each case whether the man was able to continuously pursue a substantially gainful occupation."

Carter v. U. S., 49 Fed. (2d) 221.

In this case, Omey E. Dyer died on May 1, 1929 (Ts. 26).

Although a timely demand was made therefor, the defendant refused to produce the veteran's service and hospital record at the trial (Ts. 26).

The defendant rested without introducing any evidence (Ts. 25).

The court directed a verdict for the appellee and defendant upon the ground that there was no evidence at all upon which to predicate a verdict of the jury (Ts. 97).

The action was based upon a war risk insurance policy issued to Omey E. Dyer, deceased (Ts. 11-15). It was stipulated at the time of the trial that Omey E. Dyer entered the United States Army upon August 5, 1918, and was honorably discharged therefrom upon the 25th day of April, 1919, and that on August 8, 1918, he applied for and received a policy of insurance in the amount of $10,000.00, payable in monthly installments. That the policy was in force by virtue of the actual payment of premiums and including the grace period to midnight of May 31, 1919, and that Omey E. Dyer, the veteran, died May 1, 1929, and that the plaintiff in this action, Charles E. Dyer, was the beneficiary named in Omey E. Dyer's policy of war risk insurance (Ts. 26). The appointment of Charles E. Dyer as administrator of the estate of Omey E. Dyer was duly established (Ts. 27). The residence of the plaintiff in the District of Idaho was duly

established (Ts. 27) and the only issue in the case was whether Omey E. Dyer became totally and permanently disabled prior to midnight of May 31, 1919. The physical disabilities charged in the complaint as resulting in Omey Dyer's total and permanent disability were that while in France in 1918 he was crushed in and about the abdomen by a truck and contracted hernia, adhesions, hypochlorhydria, ileo caecal stasis, gastro-enteroptosis, pharyngitis, and nervousness. (Ts. 13). Omey E. Dyer, after his enlistment, was transported to France and was seen there by the witness, John A. Gardner (Ts. 35).

In addition to the lay witnesses, two doctors were called as witnesses on behalf of the plaintiff and these doctors had treated Omey E. Dyer during his lifetime, and the relation of physician and patient existed between them and Omey E. Dyer, and Dr. Hampton testified that at the time of his treatment of Mr. Dyer in July, 1919, Mr. Omey E. Dyer gave to Dr. Hampton a history of being injured in France, being run over through the stomach by a truck (Ts. 69). Later in 1926 Omey E. Dyer was treated for his physical condition by Dr. Warren C. Hunt (Ts. 26) and at that time Omey E. Dyer gave Dr. Hunt a history of his trouble and his history was that of a long standing nervous disability and dating from his war service, wherein he had been injured in that service. That his back and chest had been injured (Ts. 62).

That in February, 1919, Omey E. Dyer came back to the hospital at Ft. Douglas, Utah, with a number of convalescents, and the witness, George Thompson, saw him

in bed at the hospital at Ft. Douglas, and at that time Dyer "couldn't hardly move." That Omey E. Dyer stayed in the hospital at Ft. Douglas from February until his discharge from the army in April, 1919. That the witness, George Thompson, who was a sergeant in the Medical Corps on duty in the hospital at Camp Douglas, Utah, testified as follows:

> "I saw him occasionally and I noticed that his face was all drawn, he was stooped, and he had to go part of the time with crutches. Then towards the last he went with a cane. He complained of his stomach all the time he was there. I saw him about a week before he was discharged from the army and he was using a cane." (Ts. 45).

This was at a time long before the policy of insurance lapsed and was in February, March and April, 1919, and the policy did not lapse until May 31st, 1919.

The witness, A. T. Springer, saw Omey E. Dyer after his return from the army; saw him the day he got off the train; that was the day that he got back from the army (Ts. 30). He was either on crutches or had a cane. He was much lighter in weight than he was when the witness saw him before he went into the army, his complexion was bad and he looked like a sick man. That Omey E. Dyer stayed around Blackfoot where this witness observed him for two or three years, and he was pale and at different times he complained of his stomach; he never regained his weight. That the veteran had a breaking out at times around his mouth—sores—he complained of his stomach continually whenever the witness saw him.

At one time the witness saw him down on his father's ranch, and Omey E. Dyer attempted to saw a board in two; that he had to stop two or three times during the time he was sawing it, due to weakness and coughing (Ts. 31).

Omey E. Dyer returned to his father's farm at Blackfoot, Idaho, in May, 1919, and his father testified that upon his return he helped around and wasn't able to go on (a motion to strike the latter part was sustained). (Ts. 27-28).

The witness, Owen J. Jones, testified that he saw Omey E. Dyer a few days after he came back from the army, and testified that Omey E. Dyer stooped a little, he was pale and he looked like he was sick (Ts. 33). He moved with a limp, favored his side and was short of breath, and that the witness went out working with him in June, 1919, pitching hay. The witness stated:

> "I was working with him pitching hay when he quit, gave out, he couldn't go on. That was in June after he came back from the army. He started to work in the morning and he lasted about an hour and a half or two hours and quit pitching hay. There was a hay crew out there pitching hay. I was pitching hay on one side of the wagon and he was pitching hay on the other side. He went home, quit." (Ts. 33).

When he came back from the army he had a cane. He used a cane off and on after that, and he used the cane from the time he came out of the army until he went on the highway. (Ts. 34).

The witness, Albert Hoeffer, knew Omey E. Dyer before the war and knew him when he came back from the army in the spring of 1919, and at that time when he saw Omey E. Dyer, he was sick and could hardly walk around. He favored his side and was pale, weak, and used a cane. (Ts. 52).

The witness, Wesley C. Thompson, testified that he saw Omey E. Dyer in the fore part of May, 1919, on his father's ranch and testified as follows:

> "I noticed that he was drawn over and he walked with a cane and complained quite a bit about his stomach. He worked under me. He went to work for me on the 14th of July, 1919. I was bridge foreman and Omey Dyer was a form builder. He was the boss of the form builders. I would say he worked under me about half a month before he took sick. He went to work on the 14th and took sick on the 28th. He worked 14 days. I took him to Dr. Hampton. Dr. Hampton was at Blackfoot. Then he worked off and on some through August. I couldn't give you the exact date." (Ts. 46-47).

The witness further testified:

> "When he took sick, he simply turned pale. He would first get some sores around his mouth, and inside his mouth, and then he would commence vomiting and he would vomit everything out that was in him; then he would get down on his hands and knees and he would vomit up slime and awful looking stuff. * * * Sometimes he would get over it and the next morning he would go back to work, but I would say that he took sick as much as three times before I took him to a doctor. I think the third time I took him to a doctor." (Ts. 47).

Dr. J. O. Hampton, a physician and surgeon by profession, and whose qualifications are admitted by the defendant, testified that the first time he saw Omey E. Dyer professionally was the 28th day of July, 1919. That Omey E. Dyer came to the Doctor's office as a patient for examination and treatment. The relationship of physician and patient existed between the Doctor and Omey E. Dyer. That he saw him quite often off and on during 1919 and quite often after that up until about 1921 (Ts. 69). That at the time of Dr. Hampton's treatment he took the history hereinbefore referred to, and on July 28, 1919, when he came to the Doctor's office, Omey E. Dyer was weak and in a debilitated condition, very anemic and very thin, and he walked in a stooped position, complaining of a good deal of pain in the stomach and epigastric region and back. He vomited, you might say, incessantly. Everything he ate at that time he vomited, couldn't retain anything on his stomach (Ts. 70). The Doctor made a physical examination, went over him as carefully as he could and found that he had a gastroptosis, a dropping down of the stomach and intestines. This caused poor digestion; in fact there wasn't any. The food just lays there and doesn't digest, it gets sour and putrid. That there was no peristaltic action to speak of, and after a while the food gets sour and is ejected from the stomach, vomited up (Ts. 70-71). And the Doctor further testified:

> "Q. And would being run over by a truck, in your opinion, as he gave you in his history, be sufficient to cause that condition?

A. Yes.

Q. In your opinion did it cause it?

A. Yes." (Ts. 71).

Dr. Hampton further testified that Omey E. Dyer was totally and permanently disabled when he saw him in 1919. Dr. Hampton again treated Omey E. Dyer in 1927 and 1928 and considered him totally and permanently disabled during the time he treated him in 1927 and 1928, and in the Doctor's opinion the injury by the truck suffered by Omey E. Dyer while in the military service and while the policy was in force was the cause of his condition in 1927 and 1928. On a history of the case given to Dr. Hampton, Dr. Hampton testified that Omey E. Dyer was totally and permanently disabled within the definition used at the time of his discharge from the United States Army on the 25th day of April, 1919 (Ts. 72-82). Dr. Hampton further testified that the cause of his total and permanent disability, according to the history that the patient had given him, was being crushed by a truck (Ts. 82) and that the Doctor found, on giving him a thorough examination, evidences of an injury in that his stomach and intestines were low, down in the hypogastric region (Ts. 82), and that in the Doctor's opinion that condition was caused by some injury. It was more exaggerated than a common type of gastro-enteroptosis. (Ts. 82).

Dr. Hampton further testified, without any qualification, that the efforts of Omey E. Dyer to carry on the work made his condition worse, saying:

"If he tried work it made this condition worse. Any mental or physical work of any kind would aggravate the condition."

And that even walking and moving around would bring on the vomiting and pain (Ts. 83), and again the Doctor testified:

"I didn't think he should work at all." (Ts. 89).

On cross examination Doctor Hampton testified:

"Q. You knew during the time you were treating him that in fact he was working?

A. Yes; and I tried to keep him from it.

Q. But he continued to work did he?

A. Some of the time." (Ts. 86).

* * * *

"Q. What did you do for permanent relief?

A. I didn't consider there would be any permanent relief for that man's condition." (Ts. 85).

The witness, John A. Gardner, saw Omey E. Dyer after his return from the army in August, 1919 and was with him practically all the time from August 1919 until about a year before Dyer's death in 1929 (Ts. 39). His physical condition looked to be very poor at that time. He was pale and he limped when he walked; kind of pulled over to one side. He was lighter in weight after he was discharged from the army. He had a poor appetite and appeared to be exhausted (Ts. 35-36). He became tired easily upon exertion, and before the war he had engaged

in sports, but he didn't engage in sports after he got out of the army. At that time he appeared to be a sick man. His physical condition became increasingly worse and he wasn't able to work continuously. He would try to work and become sick, might drop helpless right where he was working. The witness was engaged in work with him and picked him up several times when he would drop right where he was working; was engaged in the contracting business with Omey E. Dyer, and was with Omey E. Dyer practically all the time from August, 1919, until about a year before Omey E. Dyer's death (Ts. 39), and during that time Omey E. Dyer would be down sick, unable to work, too sick to work (Ts. 37). Omey E. Dyer tried to use a pick and shovel, but couldn't do it—he was terribly nervous. He could not do the ordinary tasks that other men could easily perform, and that Omey E. Dyer was sick in bed about a year of the time after he returned from the war, not counting the last year (Ts. 37), and that Omey E. Dyer would have bad vomiting spells. He would have vomiting spells both before and after eating. He vomited blood. He never used alcohol or tobacco in any form, and that the witness saw him take a lot of medicine at various times. He walked with a limp and bent over to one side—the right side. (Ts. 38).

That the insured and John A. Gardner were brother-in-laws and that they worked as contractors from 1923 to 1927 (Ts. 39). That the firm made about $4,000.00 a year from 1923 to 1927, and Omey Dyer received 50%

of all that the firm made. This witness testified that if he had been in Omey E. Dyer's place, he would not have tried to work (Ts. 40). That many times Omey E. Dyer called his brother-in-law's attention to the fact that Omey E. Dyer was not keeping up his end of the work (Ts. 41), and that Omey E. Dyer did not exact half of the proceeds from the earnings of the partnership, because he felt like he hadn't earned it (Ts. 42).

The witness, Beulah Gardner, testified that she became acquainted with Omey E. Dyer in 1921 and knew him quite well after 1923. That the first time she saw him in 1921 he didn't look to be very strong, and he was nervous and pale and had a bad complexion. Sometimes his appetite was good and other times it wasn't good. That during the time that she knew him he worked not more than half the time if he worked that much. The witness saw him lots of times when he tried to work and couldn't (Ts. 54). That he was home sick in bed close to 18 months. He was in bed lots of times. The witness saw him taking medicine and saw him vomit and vomit blood, and even though he wasn't in a spell he would be so he couldn't hardly stand, he would shake so. He walked like an old man and seemed to be lame (Ts. 55).

The witness, C. A. Dunn, testified that Omey E. Dyer always had a limp and leaned over sideways, and that Omey E. Dyer was never in good health from the time that Mr. Dunn knew him; he complained of his stomach (Ts. 57). His face was drawn and he sometimes looked like a corpse. He never could stand very much physical

work. He wasn't on the work all the time, but his partner was, and it was on account of his partner that the contract was kept up (Ts. 58). He became tired easily upon exertion and he couldn't stand but just a little work (Ts. 58). He was off the job quite often. He was always sick; in fact he kept growing gradually worse after he went to work. He worked about half the time, possibly a little more or less (Ts. 58). Many, many times he was forced to leave the job and go home sick. He was continually complaining of his back and side (Ts. 59). That Omey E. Dyer gradually grew worse and worse. That the fact that John A. Gardner was his brother-in-law had a lot to do with Omey E. Dyer being a partner. Omey E. Dyer was never entirely holding his end up (Ts. 60).

Dr. Warren Coe Hunt, a witness for the plaintiff, testified that he had been licensed to practice medicine for 21 years and had practiced in Oregon for 21 years (Ts. 61). That the first time he treated Omey E. Dyer was February 20, 1926, and he treated him for several months subsequent to that time. That he at that time gave a history of a long standing nervous disability, dating from his injury while in the service. That the immediate difficulty for which he came to the Doctor for treatment was nervous unrest, and the Doctor found difficulty with Omey Dyer's gums, phorrhea, and a general nervous debility, and later operated upon him for appendicitis (Ts. 62), and his internal difficulty may have been occasioned by the injury in 1918. That Omey E. Dyer was pale, anemic and weak and highly nervous, and that he was

also suffering from hyperacidity and chronic indigestion, and the Doctor at that time found extensive intestinal adhesions (Ts. 62). The condition of bowel stasis induced by adhesions brought about by the result of internal injury may well have brought about a predisposition to appendicitis (Ts. 63). That during the time that he knew him Omey E. Dyer was able to work continuously very little of the time owing to his weakness and general debility. That his stooping was caused by debility, weakness, pain in his back and abdomen and a general condition of exhaustion. That Omey E. Dyer was undernourished, thin, anemic and weak (Ts. 63). This Doctor further testified that he never saw Mr. Dyer when he was capable of any sustained effort, either mental or physical, on account of his general physical weakness as evidenced by anemia, accompanied by rapid, weak pulse. His condition improved, but not sufficient to permit his return to any useful work (Ts. 67), and that he should never have followed hard manual labor (Ts. 67).

In 1927 Mr. Dyer returned to his father's home at Blackfoot, Idaho, where he remained until he went to the Veterans' Hospital at Boise, Idaho, where he died on May 1, 1929 (Ts. 31). At that time he was weak, short of breath and had to sit down and rest. He would be very short of breath after he walked 200 or 300 yards (Ts. 31). This condition continued until he left Blackfoot. He remained at Blackfoot a year and four or five months before he went to the Veterans' Hospital in 1928. He was sick during that time, and the witness Albert Hoeffer testified:

"I saw him when he came back from Oregon in 1927 or 1928. I noticed at that time that he was exactly as he was when he first came back from the army, only more serious. I saw him try to work in the winter of 1927, I guess it was. I don't remember exactly. He came to my place to get a load of hay with his father. They were loading my hay and I was doing some of the chores, and I happened to look around and Omey Dyer was laying on the hay stack pale. I asked him what was the matter. He said, 'I can't work.' * * * I offered to help him and he laid on the stack until I finished helping load the load. I remember the occasion when he was hauling some fertilizer after he came back from the army. He had to stop and rest. He just couldn't make it. He would work a little while and then he would have to stop, and there was another occasion. This time he was loading hay and he vomited. I also noticed the sores around his mouth." (Ts. 52-53).

In 1927 and 1928, until he went to the Veterans' Hospital, he was again attended by Dr. J. O. Hampton, who testified that during that time Omey E. Dyer was totally and permanently disabled, and his condition was the same as he had found on July 28, 1919, only aggravated worse (Ts. 72).

SPECIFICATIONS OF ERROR

We believe that we can clearly and understandingly state our position by making specifications of the points upon which we rely and under each specification refer to the assignments of errors pertaining thereto and by which the point is raised.

SPECIFICATION NO. 1

THAT THE COURT ERRED IN RULING AND HOLDING THAT THE PLAINTIFF HAD NOT MADE A CASE FOR THE JURY AND IN DIRECTING A VERDICT FOR THE DEFENDANT.

FIRST ASSIGNMENT

That the trial court erred in ruling that the defendant was entitled to a directed verdict in its favor and in directing a verdict in its favor. (Ts. 101).

SECOND ASSIGNMENT

That the trial court erred in instructing the jury as follows:

> "Gentlemen of the jury, in the view I have taken of the law of this case, I feel compelled to find—to instruct you to find a verdict for the defendant. * * My analysis of the testimony in this case is that the plaintiff has not shown that he in fact became totally and permanently disabled between the date of the issuance of the policy until the time it lapsed, as required by the policy and the law; that there is no evidence, as I view it, at all upon which to predicate a verdict of the jury or a decree of the court. You may go into your jury room and I will send in a form of verdict, which will be in favor of the defendant." (Ts. 101-102).

THIRD ASSIGNMENT

That the trial court erred in receiving and filing the verdict. (Ts. 103).

SPECIFICATION NO. 2

THAT THE TRIAL COURT ERRED IN REFUSING TO ALLOW THE WITNESSES, BEULAH E. GARDNER, JOHN A. GARDNER, A. T. SPRINGER AND CHARLES E. DYER, TO ANSWER QUESTIONS AS TO THE PHYSICAL APPEARANCE AND CONDITION OF OMEY E. DYER.

FOURTH ASSIGNMENT

That the trial court erred in sustaining the motion to strike part of the testimony of Charles E. Dyer, the father of Omey E. Dyer, and in ruling as follows:

"Q. Did he work?

A. He helped around with me. He wasn't able to go on.

MR. GRIFFIN: Just a minute. I move to strike 'He wasn't able to go on' as a conclusion.

THE COURT: It may be stricken." (Ts. 103).

FIFTH ASSIGNMENT

That the trial court erred in ruling and holding that part of the testimony of the witness, A. T. Springer, should be stricken, when the following proceedings were had:

"Q. (By attorney for the plaintiff.) Now tell us the facts, Mr. Springer, what you observed about Omey E. Dyer at that time. Don't state any conclusions.

A. He was either on crutches or had a cane, I don't remember which to the best of my recollection. He was much lighter in weight than he was when I saw him before he went to the army, his complexion was bad, and he looked like a sick man.

MR. GRIFFIN: I move to strike 'he looked like a sick man' as a conclusion of the witness.

THE COURT: It may be stricken.

MR. GRIFFIN: And the jury be instructed not to regard it.

THE COURT: The jury understands that when any testimony is stricken by the Court they are not to consider it." (Ts. 103).

SIXTH ASSIGNMENT

That the trial court erred in sustaining the objection to the testimony of the witness, John A. Gardner:

"Q. What was his color, was it healthful, or otherwise, after he got out of the army?

MR. RYDALCH: Object to the question as a conclusion.

THE COURT: Sustained." (Ts. 104).

SEVENTH ASSIGNMENT

That the trial court erred in sustaining the objection of the defendant to the testimony of Beulah E. Gardner as to the appearance of Omey E. Dyer, in the following particulars:

"Q. Did he appear to be a sick man or a well man?

MR. RYDALCH: Object to that question as leading, and furthermore as conclusion of the witness. She could state how he appeared to her.

THE COURT: Sustained." (Ts. 104).

POINTS AND AUTHORITIES
SPECIFICATION NO. 1

THAT THE COURT ERRED IN RULING AND HOLDING THAT THE PLAINTIFF HAD NOT MADE A CASE FOR THE JURY AND IN DIRECTING A VERDICT FOR THE DEFENDANT.

PROPOSITION OF LAW NO. 1

SINCE THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THE APPELLANT'S VIEW OF THE CASE THE COURT SHOULD HAVE ALLOWED THE CASE TO GO TO THE JURY.

U. S. v. Lesher, decided May 31, 1932, ——Fed. (2d—

U. S. v. Scarborough, 57 Fed. (2d) 137.

Sorvik v. U. S., 52 Fed. (2d) 406.

Hayden v. U. S., 41 Fed. (2d) 614.

Mulivrana v. U. S., 41 Fed. (2d) 734.

U. S. v. Burke, 50 Fed. (2d) 653.

U. S. v. Lawson, 50 Fed. (2d) 646.

U. S. v. Meserve, 44 Fed. (2d) 549.

U. S. v. Scarborough, 57 Fed. (2d) 137.

U. S. v. Rasar, 45 Fed. (2d) 545.

U. S. v. Riley, 48 Fed. (2d) 203.

Corsicana National Bank of Corsicana v. Johnson, 251 U. S. 68, 40 Sup. Ct. Rep. 82, 64 L. Ed. 141.

Smith-Booth-Usher Co. v. Detroit Copper Mining Co. of Arizona, 220 Fed. 600 (C. C. A. 9th).

United States Fidelity & Guaranty Co. v. Blake, 285 Fed. 449 (C. C. A. 9th).

Alaska Fish Salting & By-Products Co. v. McMillan, 266, Fed. 26 (C. C. A. 9th).

Madray v. United States, 55 Fed. (2d) 552.

U. S. v. Gower, 50 Fed. (2d) 370 (C. C. A. 10).

Ford v. U. S., 44 Fed. (2d) 754 (C. C. A. 1).

Carter v. U. S., 49 Fed. (2d) 221 (C. C. A. 4).

Kelley v. U. S., 49 Fed. (2d) 897 (C. C. A. 1).

U. S. v. Tyrakowski, 50 Fed. (2d) 766 (C. C. A. 7).

Malavski v. U. S., 43 Fed. (2d) 974 (C. C. A. 7).

U. S. v. Godfrey, 47 Fed. (2d) 126 (C. C. A. 1).

U. S. v. Phillips, 44 Fed. (2d) 689 (C. C. A. 8).

U. S. v. Cox, 24 Fed. (2d) 944 (C. C. A. 5).

U. S. v. Acker, 35 Fed. (2d) 646 (C. C. A. 5).

A.

A REVIEW OF THE EVIDENCE DISCLOSES THAT IT IS AMPLY SUFFICIENT NOT ONLY TO SUPPORT A VERDICT, BUT TO BRING CONVICTION THAT THE PLAINTIFF SHOULD HAVE RECOVERED.

U. S. v. Lesher, decided May 31, 1932.

U. S. v. Burke, 50 Fed. (2d) 653.
U. S. v. Lawson, 50 Fed. (2d) 646.
U. S. v. Scarborough, 57 Fed. (2d) 137.
Sorvik v. U. S., 52 Fed. (2d) 406.
McNally v. U. S., (C. C. A. 8) 52 Fed. (2d) 440.

B.

WHERE A VETERAN WORKS AND SUCH WORK IS INJURIOUS TO HIM, HE IS NOT BARRED FROM RECOVERING UPON HIS WAR RISK INSURANCE.

U. S. v. Sligh, 31 Fed. (2d) 735.
U. S. v. Meserve, 44 Fed. (2d) 549.
U. S. v. Acker, 35 Fed. (2d) 646.
U. S. v. Lawson, 50 Fed. (2d) 646.
Carter v. U. S., 49 Fed. (2d) 221.
U. S. v. Godfrey, 47 Fed. (2d) 126.

SPECIFICATION NO. 2

THAT THE TRIAL COURT ERRED IN REFUSING TO ALLOW THE WITNESSES, BEULAH E. GARDNER, JOHN A. GARDNER, A. T. SPRINGER AND CHARLES E. DYER TO ANSWER QUESTIONS AS TO THE PHYSICAL APPEARANCE AND CONDITION OF OMEY E. DYER.

PROPOSITION OF LAW NO. 2

IN A CASE INVOLVING HEALTH, NON-EXPERT WITNESSES WHO HAVE HAD OPPOR-

TUNITY TO OBSERVE, ARE PERMITTED TO GIVE SHORT HAND DESCRIPTIONS OF PHYSICAL APPEARANCE AND CONDITION.

U. S. v. Woltman, decided February 29, 1932, by the Court of Appeals, District of Columbia.

Baltimore & Ohio Railroad Company v. Rambo, 59 Fed. 75.

Parker et al. v. Elgin, 5 Fed. (2d) 562.

Connecticut Mutual Life Insurance Company v. Lathrop. 111 U. S. 612, 28 L. Ed. 536.

Mutual Life Insurance Company of New York v. Leubrie, 71 Fed. 843.

Kiesel & Co. v. Sun Insurance Office of London, 88 Fed. 243.

Firemen's Insurance Company of Baltimore v. J. H. Mohlman Co., 91 Fed. 85.

Jones, Commentaries on Evidence, Second Edition, Vol. 3, Section 1252, page 2306.

Jones, Commentaries on Evidence, Second Edition, Vol. 3, Note 17, page 2306.

Jones, Commentaries on Evidence, Second Edition, Vol. 3, Section 1267, page 2335.

Greenleaf on Evidence, Vol. 1, 16th Edition, page 524.

Turner v. American Security & Trust Company, 213 U. S. 257; 53 L. Ed. 788.

Reininghaus v. Merchants' Life Association, (Iowa), 89 N. W. 1113.

Looney v. Parker (Iowa) 230 N. W. 570.

Lilly v. Kansas City Rys. Co., (Mo. App.) 209 S. W. 969.

Benson v. Smith (Mo. App.) 38 S. W. (2d) 749.

San Antonio Traction Co. v. Flory (Tex. Civ. App.) 100 S. W. 200.

Missouri, K. & T. Ry. Co. v. Gilcrease, (Tex. Civ. App.) 187 S. W. 714.

Mielke v. Dobrydnio (Mass.) 138 N. E. 561.

Tyler v. Moore (Ore.) 226 Pac. 443.

ARGUMENT

SPECIFICATION NO. 1

THAT THE COURT ERRED IN RULING AND HOLDING THAT THE PLAINTIFF HAD NOT MADE A CASE FOR THE JURY AND IN DIRECTING A VERDICT FOR THE DEFENDANT.

In this part of our brief, we will discuss our first specification, the essential point of which is that at the close of appellant's evidence, and after the defendant had rested without introducing any evidence, the court took the case from the jury and directed a verdict in favor of the appellee.

PROPOSITION OF LAW NO. 1

SINCE THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THE APPELLANT'S VIEW OF THE CASE THE COURT SHOULD HAVE ALLOWED THE CASE TO GO TO THE JURY.

We now desire to discuss the first, second and third assignments of error. This Court has rendered so many

recent decisions laying down the rule that if there is any substantial evidence in a case that it must be submitted to a jury, that we hesitate to cite any cases on this point.

As recently as May 31, 1932, this Court in *U. S. v. Lesher* (——Fed. (2d) ——) stated:

> "Under the seventh amendment to the Constitution, a jury trial is guaranteed in a civil action; and that it is error to direct a verdict for the defendant if there is any substantial evidence is *stare decisis.*"

As was said by this Court in a case that we deem to be very similar to the case at bar, *U. S. v. Scarborough,* 57 Fed. (2d) 137:

> "From a consideration of the testimony, both lay and medical, we cannot say there is no substantial evidence to sustain the findings and conclusions of the trial court."

In the Sorvik case this Court reversed the trial judge for directing a verdict in a war risk insurance case and said:

> "The test to be applied in such a case, of course, is not whether the evidence brings conviction in the mind of the trial judge; it is 'whether or not the evidence to support a directed verdict as requested, was so conclusive that the trial court in the exercise of a sound judicial discretion should not sustain a verdict for the opposing party.' *United States Fidelity & Guaranty Co. v. Blake* (C. C. A. 9), 285 F. 449, 452, and cases there cited; and *United States v. Burke,* 50 F .(2d) 653, decided by this court June 1, 1931 and cases there cited.
>
> "And in measuring the quantum of evidence necessary to sustain a possible verdict for the plaintiff,

> we must bear in mind the remedial purposes of the World War Veterans' Act (38 U. S. C. A. 421 *et seq.*) which the courts have repeatedly held should be liberally construed in favor of the veterans. *United States v. Eliasson* (C. C. A. 9), 20 F. (2d) 821, 824; *United States v. Sligh* (C.C.A. 9) 735, 736, *certiorari* denied, 280 U.S. 559, 50 S. Ct. 18, 74 L. Ed. 614; *United States v. Phillips* (C.C.A. 8) 44 F. (2d) 689, 692; *Glazow v. United States* (C. C. A. 2), 50 F. (2d) 178."

Sorvik v. U. S., 52 Fed. (2d) 406.

And in the case of Hayden v. U. S., this Court reversed the trial judge for granting a nonsuit, 41 Fed. (2d) 614, and this Court also reversed the trial judge for granting a motion for nonsuit in *Mulivrana v. U. S.,* 41 Fed. (2d) 734. The rule on this subject is very clearly expressed by this Court in *U. S. v. Burke,* 50 Fed. (2d) 653:

> "At the end of the entire testimony, the defendant made a motion for a directed verdict in its favor on the ground that the evidence was not sufficient to establish a *prima facie* case. The question is whether the evidence tending to establish total and permanent disability while the policy was in effect, was sufficient to take the case to the jury. We do not weigh the evidence but inquire merely whether there was sufficient evidence to sustain the verdict and judgment."

And on page 656, Judge Sawtelle further says:

> "Courts often experience great difficulty in determining whether a given case should be left to the decision of the jury or whether a verdict should be directed by the court. Fortunately however, the rule in this circuit court has been definitely settled and almost universally observed. Judge Gilbert, for

many years and until recently, the distinguished senior judge of this court, whose gift for expression was unsurpassed has stated the rule as follows:

" 'Under the settled doctrine as applied by all the federal appellate courts, when the refusal to direct a verdict is brought under review on writ of error, the question thus presented is whether or not there was any evidence to sustain the verdict, and whether or not the evidence to support a directed verdict as requested, was so conclusive that the trial court in the exercise of a sound judicial discretion should not sustain a verdict for the opposing party.

" 'And on a motion for a directed verdict the court may not weight the evidence, and if there is substantial evidence both for the plaintiff and the defendant, it is for the jury to determine what facts are established even if their verdict be against the decided preponderance of the evidence. *Travlers' Ins. Co. v. Randolph,* 78 F. 754, 24 C. C. A. 305; *Mt. Adams & E. P. Inclined Ry. Co. v. Lowery,* 74 F. 463, 20 C. C. A. 596; *Rochford v. Pennsylvania Co.,* 174 F. 81, 98 C. C. A. 105; *United States Fidelity & Guaranty Co. v. Blum* (C. C. A.) 270 F. 946; *Smith-Booth-Usher Co. v. Detroit Copper Mining Co.,* 220 F. 600, 136 C. C. A. 58. In the case last cited this court said:

" ' "The right to a jury trial is guaranteed by the Constitution, and it is not to be denied, except in a clear case. The foregoing decisions, and many others that might be cited, have definitely and distinctly established the rule that if there is any substantial evidence bearing upon the issue, to which the jury might properly give credit, the court is not authorized to instruct the jury to find a verdict in oppositions thereto." *United States Fidelity & Guaranty Co. v. Blake* (C. C. A.) 285 F. 449, 452.'

"Again 'such an instruction would be proper only where, admitting the truth of the evidence for the plaintiff below, as a matter of law, said plaintiff could not have a verdict.' *Marathon Lumber Co. v. Dennis,* 296 F. 471 (C. C. A. 5).

"See also the following recent decisions of this court: *U. S. v. Barker* (C. C. A.), 36 F. (2d) 556; *U. S. v. Meserve* (C. C. A.), 44 F. (2d) 549; *U. S. v. Rice* (C. C. A.), 47 F. (2d) 749; *U. S. v. Stamey,* (C. C. A.) 48 F. (2d) 150; *U. S. v. Lawson,* (C. C. A.), 50 F. (2d) 646."

U. S. v. Burke, 50 Fed. (2d) 653.

And this Court has held that there was sufficient evidence to go to a jury in the following war risk insurance cases:

U. S. v. Lawson, 50 Fed. (2d) 646.

U. S. v. Meserve, 44 Fed. (2d) 549.

U. S. v. Scarborough, 57 Fed. (2d) 137.

U. S. v. Lesher, opinion filed May 31, 1932, ——Fed. (2d) ——.

U. S. v. Rasar, 45 Fed. (2d) 545.

U. S. v. Riley, 48 Fed. (2d) 203.

The United States Supreme Court has said:

"So far as the above-recited facts were in dispute, there was substantial evidence tending to support a view of them favorable to plaintiff's contentions. What weight should be given to it was for the jury, not the court, to determine. *Hepburn v. Dubois,* 12 Pet. 345, 376, 9 L. Ed. 1111, 1123; *Lancaster v. Collins,* 115 U.S. 222, 225, 29 L. Ed. 373, 374, 6 Sup. Ct. Rep. 33; *Chicago & N. W. R. Co. v. Ohle,* 117 U. S. 123, 129, 29 L. Ed. 837, 839, 6 Sup. Ct. Rep. 632;

Aetna L. Ins. Co. v. Ward, 140 U. S. 76, 91, 35 L. Ed. 371, 376, 11 Sup. Ct. Rep. 720; *Troxel v. Delaware, L. & W. R. Co.,* 227 U. S. 434, 444, 57 L. Ed. 586, 591, 33 Sup. Ct. Rep. 274."

Corsicana National Bank of Corsicana v. Johnson, 251 U. S. 68, 40 Sup. Ct. Rep. 82, 64 L. Ed. 141.

This court has said:

"The right to a jury trial is guaranteed by the Constitution, and it is not to be denied except in a clear case. The foregoing decisions, and many others that might be cited, have definitely and distinctly established the rule that if there is any substantial evidence bearing upon the issue, to which the jury might properly give credit, the court is not authorized to instruct the jury to find a verdict in opposition thereto. Tested by these rules and on a careful consideration of the evidence in the case at bar, we are of the opinion that the cause should have been submitted to the jury."

Smith-Booth-Usher Co. v. Detroit Copper Mining Co. of Arizona, 220 Fed. 600. (C. C. A., Ninth Circuit).

"Under the settled doctrine as applied by all the federal appellate courts, when the refusal to direct a verdict is brought under review on writ of error, the question thus presented is whether or not the evidence to support a directed verdict as requested, was so conclusive that the trial court in the exercise of a sound judicial discretion should not sustain a verdict for the opposing party.

"And on a motion for a directed verdict the court may not weigh the evidence, and if there is substantial evidence both for the plaintiff and the defendant, it is for the jury to determine what facts are estab-

lished even if their verdict be against the decided preponderance of the evidence. *Travelers' Ins. Co. v. Randolph,* 78 Fed. 754, 24 C. C. A. 305; *Mt. Adams & E. P. Inclined Ry. Co. v. Lowery,* 74 Fed. 463, 20 C. C. A. 596; *Rochford v. Pennsylvania Co.,* 174 Fed. 81, 98 C. C. A. 105; *United States Fidelity & Guaranty Co. v. Blum* (C. C. A.) 270 Fed. 946; *Smith-Booth-Usher Co. v. Detroit Copper Mining Co.,* 220 Fed. 600, 136 C. C. A. 58. In the case last cited this court said:

" 'The right to a jury trial is guaranteed by the Constitution, and it is not to be denied, except in a clear case. The foregoing decisions, and many others that might be cited, have definitely and distinctly established the rule that if there is any substantial evidence bearing upon this issue, to which the jury might properly give credit, the court is not authorized to instruct the jury to find a verdict in opposition thereto.' "

United States Fidelity & Guaranty Co. v. Blake, 285 Fed. 449 (C. C. A., Ninth Circuit).

"In order to warrant a directed verdict, the case on the testimony must be clear and indisputable, and about which there could reasonably be but one opinion. *Lincoln v. Power,* 151 U. S. 436, 439, 14 Sup. Ct. 387, 38 L. Ed. 224. See, further, as to a directed verdict, *Huber v. Miller,* 41 Or. 103, 68 Pac. 400, and *Stager v. Troy Laundry Co.,* 41 Or. 141, 68 Pac. 405. From the foregoing, we are led to the conclusion that a directed verdict was properly denied."

Alaska Fish Salting & By-Products Co. v. McMillan, 266, Fed. 26 (C. C. A., Ninth Circuit).

In a very recent case, the Circuit Court of Appeals for the Fourth Circuit, had a case before it in which there

was no medical testimony whatever offered. The trial judge directed a verdict in favor of the defendant, and the Circuit Court reversed the case saying:

> "In considering whether a trial judge has erred in directing a verdict, we must apply the firmly established rule that the evidence must be regarded in its aspect most favorable to the opposing party; that the weight of the testimony is always for the jury to determine, and that therefore, a trial judge should not direct a verdict unless the evidence is so conclusive that were a verdict rendered for the opposing party, the court, in the exercise of a sound judicial discretion, would be compelled to set it aside. *Norris v. N. Y. Life Insurance Co.* (C. C. A. 49 F. (2d) 62; *South Carolina Asparagus Growers' Association v. Southern Ry. Co.* (C. C. A.) 46 F. (2d) 452; *Will Edwards v. U. S.* (C. C. A.) 53 F. (2d) 622. * * * *.
>
> "We therefore feel that these facts, viewed as they must be in the light most favorable to the appellant, required submission to the jury of the question of the character and extent of appellant's disability, and that therefore the trial judge erred in withdrawing the case from the jury and in directing a verdict in the government's favor."

Madray v. United States, 55 Fed. (2d) 552.

For other war risk insurance cases holding that the facts presented a case for the jury, see:

U. S. v. Gower, 50 Fed. (2d) 370 (C. C. A. 10).
Ford v. U. S., 44 Fed. (2d) 754 (C. C. A. 1).
Carter v. U. S., 49 Fed. (2d) 221 (C. C. A. 4).
Kelley v. U. S., 49 Fed. (2d) 897 (C. C. A. 1).
U. S. v. Tyrakowski, 50 Fed. (2d) 766 (C. C. A. 7).

Malavski v. U. S., 43 Fed. (2d) 974 (C. C. A. 7).
U. S. v. Godfrey, 47 Fed. (2d) 126 (C. C. A. 1).
U. S. v. Phillips, 44 Fed. (2d) 689 (C. C. A. 8).
U. S. v. Cox, 24 Fed. (2d) 944 (C. C. A. 5).
U. S. v. Acker, 35 Fed. (2d) 646 (C. C. A. 5).

A.

A REVIEW OF THE EVIDENCE DISCLOSES THAT IT IS AMPLY SUFFICIENT NOT ONLY TO SUPPORT A VERDICT, BUT TO BRING CONVICTION THAT THE PLAINTIFF SHOULD HAVE RECOVERED.

The trial court in directing the jury to render a verdict for defendant, stated:

> "That there is no evidence, as I view it, at all on which to predicate a verdict of the jury or a decree of the court." (Ts. 102).

It will be remembered that in this case the defendant introduced no evidence of any kind or character (Ts. 95), and it will be further remembered that although the plaintiff in this case on February 20, 1932, demanded that the defendant produce all of the records in possession of the defendant, and that the defendant failed and refused to produce the service record of Omey E. Dyer, that is, his hospital record while in the military service. (Ts. 26).

We are confident that an analysis of the testimony in this record discloses not only sufficient evidence to support a verdict or judgment, but to bring conviction that

the verdict and judgment should have been for the plaintiff.

A summary of the evidence, which is undisputed and uncontradicted, is as follows:

The deceased veteran, Omey E. Dyer, was accepted for military service by the defendant on August 5, 1918, (Ts. 26), and at that time he was about the age of 25 years (Ts. 34-35). He received his insurance certificate on August 8, 1918. (Ts. 26). This insurance was in force by reason of the actual payment of premiums until the 31st day of May, 1919. (Ts. 26). Omey E. Dyer, the insured, died May 1, 1929. (Ts. 26). After Omey E. Dyer's enlistment, he was transported to France, where he was seen by one witness in November, 1918. (Ts. 38). At that time he weighed 150 lbs. (Ts. 39).

In July 1919, Omey E. Dyer, while consulting his physician told him that he had been run over through the region of the stomach by a truck while in France. (Ts. 69). Omey E. Dyer gave the same history to his physician, Dr. Hunt, in 1926. (Ts. 62).

In February 1919, which was several months before his policy lapsed, Omey E. Dyer came back to Fort Douglas, Utah, along with other convalescing soldiers, and he was in bed in the hospital at Fort Douglas, and at that time Omey E. Dyer "couldn't hardly move." He stayed in the hospital at Fort Douglas from February until his discharge on April 25, 1919 (Ts. 45), and at that time his face was all drawn, he was stooped and had to go part of

the time on crutches. He then went with a cane. He complained of his stomach all the time he was there. (Ts. 45). The day he got off the train on coming from the army, he was either on crutches or had a cane. He was much lighter in weight than before he went to the army. (Ts. 30). His complexion was bad and he looked like a sick man. He never regained his weight. (Ts. 30).

He returned to his father's home at Blackfoot, Idaho, in May, 1919, while his policy was still in force, and he helped around and wasn't able to go on. He stayed on his father's place about three months. Another witness saw him a few days after he came back from the army and Omey E. Dyer stooped a little, he was pale, and he looked like he was weak. (Ts. 33). He moved with a limp, favored his side, and was short of breath. In June 1919, this witness saw him try to pitch hay and he couldn't go on. He lasted about 1½ or 2 hours at this work (Ts. 33). When he came back from the army, he had a cane. He used the cane on and off after that. Another witness testified that when Omey Dyer came home from the army, he was sick and could hardly walk around. He favored his side, was pale, weak, and used a cane. (Ts. 52).

On July 14, 1919, he went to work as a form builder. He worked 14 days and was taken to Dr. Hampton. (Ts. 46-47). He was sick and vomited. He had three of these vomiting spells before he went to Dr. Hampton. (Ts. 47).

On July 28, 1919, less than two months from the time his policy lapsed, he became a patient of Dr. J. O. Hampton and remained Dr. Hampton's patient at that time up until about 1921. (Ts. 69). When he came to Dr. Hampton's office, he was weak and debilitated, very anemic, very thin, and walked in a stooped position, complaining of pain in the stomach and epigastric region and back. He vomited incessantly. Everything he ate he vomited, could retain nothing on his stomach (Ts. 70). The Doctor found that he had a gastroptosis, a dropping down of the stomach and intestines which destroyed digestion. The food lay there and got sour and putrid. There was no peristaltic action. (Ts. 70). In the Doctor's opinion, his being run over by a truck was sufficient to cause that condition. (Ts. 71). That in the Doctor's opinion, he was totally and permanently disabled on July 28, 1919 on account of the condition above described. (Ts. 71). Dr. Hampton tried to keep him from working. (Ts. 86). That in the Doctor's opinion, Omey E. Dyer should not have worked at all. (Ts. 89). *That any mental or physical work of any kind would aggravate Omey E. Dyer's condition.* That even walking and moving around would bring on the vomiting and pain. (Ts. 83). And that in the Doctor's opinion, there would not be any permanent relief for the man's condition. (Ts. 85). *That Omey E. Dyer was totally and permanently disabled at the time of his discharge from the United States Army on the 25th day of April, 1919.* (Ts. 72-83). While he was taking treatment from Dr. Hampton, he was also work-

ing with or under Wesley C. Thompson except for five months when he was up in Bonneville County, and during that five months he came down sick and stayed at Thompson's place 3 or 4 days. (Ts. 48). He was pale and weak and had vomiting and gagging spells. Between 1919 and April of 1921, he was off work one-fourth of the time with this sickness. He had 20 or 25 spells between 1919 and 1921. (Ts. 48). He would get vomiting spells when he was only off 4 or 5 hours. Then other times Mr. Thompson would send him home. (Ts. 49). In August 1919 when seen by the witness John A. Gardner, Omey E. Dyer's physical condition looked to be very poor. He was pale and he limped when he walked, kind of pulled over to one side. (Ts. 35). He had a poor appetite and appeared to be exhausted. (Ts. 36). He became tired easily upon exertion and appeared to be a sick man. His physical condition became increasingly worse. He wasn't able to work continuously. He might drop helpless right where he was working. He was picked up several times by this witness when he dropped right where he was working. (Ts. 36). From 1921 until 1928 he attempted to engage in contract business with his brother-in-law, John A. Gardner, who was with him practically all the time from August 1919 until Omey E. Dyer went to the Veterans' Hospital where he died in 1929 (Ts. 39).

During that entire time, Omey E. Dyer would be down sick, unable to work, too sick to work. (Ts. 37). That he was actually sick in bed about a year after he returned

from the army, not counting the last year. (Ts. 37). During that time he had bad vomiting spells. He vomited blood. (Ts. 38). From 1923 to 1927, the firm of Gardner & Dyer made about $4,000 a year and Omey E. Dyer received 50% of all the firm made. (Ts. 40). But his partner testified that if he had been in Omey Dyer's place he would not have tried to work; that many times Omey Dyer called his partner's attention to the fact that he (Dyer) was not keeping up his end of the work; that he did not exact half of the proceeds from the earnings of the partnership because he felt that he didn't earn it. (Ts. 42).

That in 1921 he did not look to Beulah Gardner to be very strong. He was nervous and pale and had a bad complexion. That between 1921 and 1928 he worked not more than half the time. That he tried lots of times to work and couldn't. (Ts. 54). That he was at home sick in bed close to 18 months. He was in bed lots of times. He took medicine and vomited blood and even though he was not in a spell, he would be so he couldn't hardly stand. He would shake so. He walked like an old man and seemed to be lame. (Ts. 55).

His employer, C. A. Dunn, knew him from 1923 to 1927 and Omey E. Dyer always had a limp and leaned over side-ways. That he was never in good health and complained of his stomach. (Ts. 57). His face was drawn and he sometimes looked like a corpse. He never could stand much physical work. He wasn't on the work all the time, but his partner was, and it was on account

of his partner that the contract was kept up. (Ts. 58). He became tired easily upon exertion and couldn't stand but just a little work. (Ts. 58). He was off the job quite often, he was always sick. He kept growing gradually worse. He worked about half the time, possibly a little more or less. (Ts. 58). Many, many times he was forced to leave the job and go home sick. He was continually complaining of his back and side. The fact that John A. Gardner was Omey Dyer's brother-in-law had a lot to do with his being a partner. He was never entirely holding his end up. (Ts. 60).

In 1923 Omey E. Dyer consulted a Dr. Lucas at Hornbrook, Oregon, and then went to Portland, Oregon, to some doctors after that. (Ts. 40).

That Omey E. Dyer was under the care of Dr. Warren Coe Hunt from February 20, 1926 on for several months. That he was very nervous, had a general nervous debility. That he was pale, anemic, and weak, and was suffering from chronic indigestion and hyperacidity and extensive intestinal adhesions. (Ts. 64). That he had a condition of bowel stasis induced by the adhesions. (Ts. 66). That he was able to work continuously very little of the time owing to his weakness and general debility. He was highly nervous, restless, sleepless and could stand no physical exertion. (Ts. 66). That his stooping was caused by debility, weakness, pain in his back and abdomen and a general condition of exhaustion. That he was undernourished, and at that time he was not capable of any sustained effort either mental or physical because of his

general physical weakness as evidenced by anemia, a rapid, weak pulse. (Ts. 67). That while his condition improved somewhat, it was not sufficient to permit his return to useful work. (Ts. 67).

Omey E. Dyer grew gradually worse and worse and his brother-in-law dissolved the partnership because Omey Dyer couldn't longer go on. (Ts. 60). He remained in the partnership until 1927 when he finally had to quit. (Ts. 56). After the dissolution of the partnership in 1927, Omey E. Dyer didn't do anything. He wasn't able to do anything. His father had a little place at Blackfoot, so he just went there to live and stayed with his family. He was in the hospital in Boise from seven to nine months before his death on May 1, 1929.

After the dissolution of the partnership between himself and his brother-in-law, Omey Dyer remained in his father's home at Blackfoot about a year and four months before he went to the Veterans' Hospital in the fall of 1928. During that period he was sick, he was very drawn and stooped. Sometimes he would walk with a cane. He always complained of his stomach. (Ts. 49). At that time he was weak, short of breath after he walked two or three hundred yards and had to sit down and rest. (Ts. 39). At this time he tried to milk and couldn't. (Ts. 49). He was exactly as when he first came back from the army, only more serious. He tried to work, assisting loading hay, and he could not do it. (Ts. 52-53). He continued to have sores around his mouth and vomited. (Ts. 53). During 1927 and 1928 until he

went to the Veterans' Hospital where he died, Omey Dyer was again attended by Dr. Hampton, and that he was totally and permanently disabled, in the Doctor's opinion, during that time for the same condition that the Doctor had found in 1919. (Ts. 82-83). Omey E. Dyer died May 1, 1929. (Ts. 26).

We do not believe that the above narration of facts would leave any doubt in the mind of any impartial tribunal—whether it be a jury, trial judge, or appellate court—that Omey E. Dyer was totally and permanently disabled within the definition used in war risk insurance cases from the time that he returned from France and was sent to the hospital at Salt Lake in February 1919 until his death. And we believe that the facts presented make a much stronger case than that of *Lesher v. United States, supra,* wherein this Court said:

> "The Court does not weigh the evidence but considers whether there is any or sufficient evidence to sustain a verdict. (See *Ford v. U. S.,* 44 Fed. (2d) 754). And in war risk cases the most favorable construction should be given the evidence that is produced (*Ford v. U. S. supra*). The trial judge must, in the exercise of sound discretion, determine whether upon the evidence produced a verdict can be sustained, not weigh the evidence. If there is evidence, it must be submitted; if not, it is pronouncedly his duty to direct a verdict."

—— Fed. (2d) ———.

It was further said by this Court in the Lesher case, even though the veteran had been on a payroll continuously from September 1920 until December 1922:

> "There is, however, a continuity of conditions related by the witness prior to his discharge by persons who were in close contact with him, including his captain and 'buddies', who, by reason of position or employment, were peculiarly situated to observe him. And this condition continued long past his earning period. He was carried on the payroll, but 'that does not signify he worked. * * * The other boys took care of his work.' The testimony of the specialist predicated on disclosed conditions, including medical testimony of the earliest examination, tends to an illucidation of the disability, and that was for the jury's consideration."

(*Lesher v. United States of America*).

We consider this a stronger case in plaintiff's favor on the facts than either the case of *United States v. Burke,* 50 Fed. (2d) 653, or *United States v. Lawson,* 50 Fed. (2d) 646, for the reason that in this case there is no evidence offered by the defendant to dispute the testimony of plaintiff's witnesses, and in both the Burke and the Lawson cases the veterans were yet alive, whereas in this case the veteran was dead. And it is stronger than the case of *United States v. Gower,* 50 Fed. (2d) 370, decided by the Tenth Circuit Court of Appeals, where a verdict was sustained even though plaintiff's doctor had refused to testify that the plaintiff was totally and permanently disabled. We cannot reconcile the direction of the verdict in this case by the trial judge with the principles of law laid down by this court in cases too numerous to mention. These facts that we have recounted are undisputed, and we submit that it is impossible in the face of this record to explain the trial judge's decision that

> "There is no evidence, as I view it, at all on which to predicate a verdict of the jury or a decree of this court."

and that this ruling by the trial judge shows either that he had a misconception of what the testimony was, or he had forgotten material parts of it, or had a misconception of the law applicable to the situation, and that his statement is without any foundation, much less being in accord with statements made by this court to this effect:

> "Under the Seventh Amendment to the Constitution, a jury trial is guaranteed in a civil action."

United States v. Lesher, supra.

> "From a consideration of the testimony, both lay and medical, we cannot say there was no substantial evidence to sustain the findings and conclusions of the trial court."

U. S. v. Scarborough, 57 Fed. (2d) 137.

> "The test to be applied in such a case, of course, is not whether the evidence brings conviction in the mind of the trial judge. It is whether the evidence to support a directed verdict as requested was so conclusive that the trial court, in the exercise of a sound judicial discretion, should not sustain a verdict for the opposing party."

Sorvik v. U. S., 52 Fed. (2d) 406.

> "And in measuring the quantum of evidence necessary to sustain a possible verdict for the plaintiff, we must bear in mind the remedial purposes of the World War Veterans' Act * * * which the courts have repeatedly held should be liberally construed in favor of the veterans."

Sorvik v. U. S. 52 Fed. (2d) 406.

> "And the right to a jury trial is guaranteed by the Constitution and it is not to be denied except in a clear case."

U. S. v. Burke, 50 Fed. (2d) 653.

> "On a motion for a directed verdict, the Court may not weigh the evidence, and if there is substantial evidence, both for the plaintiff and the defendant, it is for the jury to determine what facts are established, even if their verdict be against the decided preponderance of the evidence."

U. S. v. Burke, 50 Fed. (2d) 653.

In a war risk case, where the trial judge had directed a verdict against the plaintiffs, Judge Kenyon speaking for the Eighth Circuit, said:

> "As the court directed a verdict against plaintiffs they are entitled to have the evidence and inferences therefrom most strongly construed in their favor."

McNally v. United States (C. C. A. 8), 52 Fed. (2d) 440.

We submit that it is not necessary for the plaintiffs in this case, "to have the evidence and the inferences therefrom most strongly construed in their favor" in order to justify a reversal in this case. The evidence is undisputed that Omey E. Dyer was a war victim and was never able to work continuously after his return from the war.

B.

WHERE A VETERAN WORKS AND SUCH WORK IS INJURIOUS TO HIM, HE IS NOT BARRED FROM RECOVERING UPON HIS WAR RISK INSURANCE.

The evidence is undisputed that Omey E. Dyer never should have done any work after his discharge from the Army.

Dr. J. O. Hampton testified without any contradiction that the efforts of Omey E. Dyer to work made his condition worse. "Any mental or physical work of any kind would aggravate the condition." (Ts. 83). That even walking or moving around would bring on the vomiting and pain. (Ts. 83). "I didn't think he should work at all." (Ts. 89). That he knew Omey E. Dyer was working some of the time "and I tried to keep him from it." (Ts. 86).

This Court speaking through the revered Judge Dietrich in the Sligh case said:

> "Aside from the consideration that the testimony tended to show that the employer was moved by sentiment and sympathy, fairly construed, the policy is to be understood as meaning not present ability in an absolute, but a capacity that may be legitimately exercised; that is, without serious peril to the life or health of the insured. * * * Had appellee put aside concern for the immediate necessities of his family, and yielding to the advice of a conservative physician, wholly refrained from work, it may be doubted whether any question would have been rais-

> ed of his right to receive the insurance. But manifestly his 'ability' in a legal sense would be the same in one case as in the other."

U. S. v. Sligh, 31 Fed. (2d) 735.

There is no evidence in this case that Omey E. Dyer ever worked continuously, and as a matter of fact, the evidence is just to the contrary. And certainly, in view of Dr. Hampton's testimony, the holding of this Court in the Meserve case is applicable, wherein it said:

> "The question is not what the railroad company's payroll shows; it is what was the physical condition of the insured at that time. The record facts have no mysterious convincing force which forecloses their being explained and ameliorated by the proof of attendant and surrounding circumstances and conditions."

U. S. v. Meserve, 44 Fed. (2d) 549.

And the Circuit Court of Appeals for the Fifth Circuit in *United States v. Acker* held:

> "For a disability to be total within the meaning of the above referred to provision, it is not necessary that the insured's condition be such as to render it impossible for him to engage in any substantially gainful occupation. It is enough that his condition be such as to render him unable, in the exercise of ordinary case and prudence, to engage continuously in any substantially gainful employment. Appellee's disability was not kept from being total by his intermittent business activities, if, without the exercise of ordinary care or prudence, they were engaged in at the risk of substantially aggravating the ailment with which he was afflicted."

U. S. v. Acker, 35 Fed. (2d) 646.

We believe that the Acker case is directly in point here, and that Omey E. Dyer, under the evidence in this case, was not exercising ordinary care and prudence when he attempted to do any work, and had the matter gone to the jury, the jury might well have found, under the evidence, that it was his efforts to work that made his condition grow increasingly worse and that lead to his death.

In the Lawson case, decided by this Court, there was a much longer work record than appears in this case, but the circumstances under which the work was performed were similar to the conditions existing in the case at bar, and in the Lawson case this Court said:

> "It might be argued that the fact that plaintiff managed to hold several positions for the greater part of the time during the years in question, and actually engaged in work proves that he was able to work and not totally and permanently disabled. But this does not necessarily follow. It is a matter of common knowledge that many men work in the stress of circumstances when they should not work at all. When they do that, they should not be penalized, rather should they be encouraged. A careful examination and consideration of the evidence herein convinces us that the plaintiff worked when he was physically unable to do so, and that, but for the gratuitous assistance of friends and relatives who did much of his heavy work and the assistance of those whom plaintiff employed at his own expense, he would have been unable to retain his several positions. Under such circumstances, he should not be made to suffer for carrying on when others less disabled than he would have surrendered."

U. S. v. Lawson, 50 Fed. (2d) 646.

And in the Lawson case, *supra,* this Court cited with approval the decision of the Fourth Circuit Court of Appeals in the case of *Carter v. U. S.,* 49 Fed. (2d) 221, wherein it was said:

> "To say that the man who works, and dies, is as a matter of law precluded from recovery under the policy, but that the one who followed the advice of his physician refrains from such work, and lives is entitled to recovery, presents an untenable theory of law and fact, and emphasizes the necessity for a determination upon the facts in each case whether the man was able to continuously pursue a substantially gainful occupation."

Carter v. U. S., 49 Fed. (2d) 221.

In this case Omey E. Dyer worked and died. His closely associated partner from the year 1919 to 1927, Mr. Gardner, testified in regard to Mr. Omey E. Dyer's physical condition and said:

> "If it had been me, I would have filed a claim (against the government—compensation or payments from the government) and not tried to work." (Ts. 40).

This Court cited with approval the decision of the Circuit Court of Appeals for the First Circuit in *United States v. Godfrey*:

> "The evidence is persuasive that Godfrey was a war victim. He was entitled to the most favorable view of the evidence. (Citing cases). To hold him remediless because he tried manfully to earn a living for his family and himself, instead of yielding to

> justifiable invalidism, would not, in our view, accord with the treatment Congress intended to bestow on our war victims."

U. S. v. Godfrey, 47 Fed. (2d) 126.

See also *U. S. v. Stewart,* 58 Fed. (2d) 520.

It is quite clear that the appellants were entitled to have this case submitted to the jury.

SPECIFICATION NO. 2

THAT THE TRIAL COURT ERRED IN REFUSING TO ALLOW THE WITNESSES, BEULAH E. GARDNER, JOHN A. GARDNER, A. T. SPRINGER AND CHARLES E. DYER TO ANSWER QUESTIONS AS TO THE PHYSICAL APPEARANCE AND CONDITION OF OMEY E. DYER.

PROPOSITION OF LAW NO. 2

IN A CASE INVOLVING HEALTH, NON-EXPERT WITNESSES WHO HAVE HAD OPPORTUNITY TO OBSERVE, ARE PERMITTED TO GIVE SHORT HAND DESCRIPTIONS OF PHYSICAL APPEARANCE AND CONDITION.

Under this heading we desire to discuss the sixth, seventh, fourth and fifth assignments in the above order. We believe that all these can be discussed under this heading.

Beulah E. Gardner testified that she was Omey E. Dyer's sister-in-law. That she knew him quite well. That he was nervous and pale and had a bad complexion; that

he had lost weight; that he appeared to be exhausted. This witness was asked, "Did he appear to be a sick man or a well man?" to which it was objected that the question was leading and called for a conclusion, and the court sustained the objection (Ts. 54).

John E. Gardner testified that he had been acquainted with Omey E. Dyer since 1900 and was acquainted with him from that time up to the time of his death (Ts. 34-35). This witness was asked, "What was his color, was it healthful or otherwise, after he got out of the army?" to which an objection was made that it called for a conclusion and the court sustained the objection (Ts. 36).

The court also on motion struck from the testimony of Omey Dyer's father the statement that "He wasn't able to go on" as a conclusion (Ts. 27-28).

The court also struck out of the testimony of the witness, A. T. Springer, "And he looked like a sick man" on the ground that it was a conclusion (Ts. 30).

In *United States v. Woltman,* the Court of Appeals for the District of Columbia had under consideration a war risk case in which non-medical witnesses testified that the plaintiff did not have the ability to follow a gainful occupation and in regard to that testimony the court said:

> "It is always proper to permit a non-professional witness who has had an opportunity to observe a sick or injured person to testify with respect to whether such a person is helpless or unable to work. The value of the opinion depends, of course, upon the intelligence of the witness and his opportunity to know

of the condition as to which he testifies and the ordinary effect of such a condition. In this case the groundwork was sufficiently laid and we think the evidence was properly received."

U. S. v. Woltman, decided February 29, 1932, by the Court of Appeals, District of Columbia, —Fed. (2d) ———.

Although it is a general rule that a lay witness may not testify as to his opinion on a subject or to give his conclusions there are nevertheless certain exceptions as particularly set forth in the case of *Baltimore & Ohio Railroad Company v. Rambo,* 59 Fed. 75:

". . . On the trial, the chief issue of fact was the extent of the plaintiff's injuries. It was contended on his behalf that he was suffering from paralysis of his left leg and the muscles of his back, so as to permanently disable him, while the defendant company maintained that he was not suffering from paralysis, but was feigning disability for the purpose of increasing the amount of his recovery. . . . . ."

In answer to certain questions addressed to lay witnesses concerning what they saw and their opinion as to his condition, the following rule was made:

"It is objected also that some of the above statements are mere matter of opinion and conclusions of the witness from facts which he observed. This is true, but it does not render the statements incompetent. Where the statement of a witness is an inference from many minor details which it would be impossible for him to present in the form of a picture to the jury except by the statement of his inference or opinion, that opinion is generally compe-

> tent. *Parker v. Steamboat Co.,* 109 Mass. 449. In *Village of Shelvy v. Clagett,* 46 Ohio St. 549, 22 N. E. 407, it was held that a nonprofessional witness, who had had opportunities to observe a sick or injured person, might give in evidence his opinion of such person in respect of his being weak and helpless or not, and of the degree of suffering which he endured, provided such opinion was founded on his own observation of the person to whom his evidence related, and was limited to the time that the person was under his observation."

In the case of *Parker et al. v. Elgin,* 5 Fed. (2d) 562, the Circuit Court of Appeals stated:

> ". . . Opinion evidence may be given by a non-expert witness in many matters where it is impossible to reproduce or describe in words every detail upon which the opinion of the witness is predicated. . . . ."

The United States Supreme Court in the case of *Connecticut Mutual Life Insurance Company v. Lathrop,* 111 U. S. 612, wherein the issue was as to the sanity of the insured immediately preceding the time of his death by suicide and wherein witnesses were asked to state the impression made upon them of what they saw of the insured's condition and the defendant objected to the question as incompetent, which objection was overruled, stated:

> "It is contended, in behalf of plaintiff in error, that the impressions and opinions of these nonprofessional witnesses as to the mental condition of the insured, although accompanied by a statement of the grounds upon which they rested, were incompetent as evidence of the fact of insanity. This

question was substantially presented in *Ins. Co. v. Rodel,* 95 U. S. 232, which was an action upon a life policy containing a clause of forfeiture in case the insured died by his own hand. The issue was as to his sanity at the time of the act of self-destruction. Witnesses acquainted with him described his conduct and appearance at or about and shortly before his death. They testified as to how he looked and acted. One said that he 'looked like he was insane;' another, that his impression was that the insured 'was not in his right mind.' In that case the court said, that 'Although such testimony from ordinary witnesses may not have great weight with experts, yet it was competent testimony and expressed in an inartificial way the impressions which are usually made by insane persons upon people of ordinary understanding.'

"The general rule undoubtedly is, that witnesses are restricted to proof of facts within their personal knowledge and may not express their opinion or judgment as to matters which the jury or the court are required to determine, or which must constitute elements in such determination. To this rule there is a well established exception in the case of witnesses having special knowledge or skill in the business, art or science, the principles of which are involved in the issue to be tried. Thus, the opinions of medical men are admissable in evidence as to the sanity or insanity of a person at a particular time, because they are supposed to have become, by study and experience, familiar with the symptoms of mental disease and, therefore, qualified to assist the court or jury in reaching a correct conclusion. And such opinions of medical experts may be based as well upon a hypothetical case disclosed by the testimony of others. But are there no other exceptions to the general rule to which we have referred?

". . . . There are matters of which all men have more or less knowledge, according to their mental capacity and habits of observation; matters about which they may and do form opinions, sufficiently satisfactory to constitute the basis of action. While the mere opinion of a non-professional witness, predicated upon facts detailed by others, is incompetent as evidence upon an issue of insanity, his judgment, based upon personal knowledge of the circumstances involved in such an inquiry, certainly is of value; because the natural and ordinary operations of the human intellect and the appearance and conduct of insane persons, as contrasted with the appearance and conduct of persons of sound mind, are more or less understood and recognized by everyone of ordinary intelligence who comes in contact with his species. The extent to which such opinions should influence or control the judgment of the court or jury must depend upon the intelligence of the witness, as manifested by his examination, and upon his opportunities to ascertain all the circumstances that should properly affect any conclusion reached.

". . . In form, it is opinion, because it expresses an inference or conclusion based upon observation of the appearance, manner and motions of another person, of which a correct idea cannot well be communicated in words to others, without embodying, more or less, the impressions or judgment of the witness. . . ."

Connecticut Mutual Life Insurance Company v. Lathrop, 111 U. S. 612.

Same law:

Mutual Life Insurance Company of New York v. Leubrie, 71 Fed. 843.

In the case of *Kiesel & Co. v. Sun Insurance Office of London,* 88 Fed. 243, the court stated:

". . . One witness may be able to make so graphic a word picture of a scene he has witnessed that those who hear it are in as good a situation to deduce a correct conclusion as he is; while another, who has observed the same incidents, may be utterly incapable of describing them, and can do nothing but state the impression or conclusion he drew from them. The trial court sees and hears each witness, and in doubtful cases is far better qualified than the court of appeals to determine whether a witness should be confined to the facts or should be allowed to state his conclusions. . . ."

In *Firemen's Insurance Company of Baltimore v. J. H. Mohlman Co.,* 91 Fed. 85, the Circuit Court stated that it is not a valid objection to opinion evidence that the opinion covers the whole ground of the inquiry which the jury are to decide, if the case is one to be fully resolved by opinion evidence.

See also:

Jones, Commentaries on Evidence, Second Edition, Vol. 3, Section 1252, page 2306.

Jones, Commentaries on Evidence, Second Edition, Vol. 3, Note 17, page 2306.

Jones, Commentaries on Evidence, Second Edition, Vol. 3, Section 1267, page 2335.

Greenleaf on Evidence, Vol. 1, 16th Edition, page 524.

Connecticut Mutual Life Insurance Company v. Lathrop, 111 U. S. 612; 28 L. Ed. 538-9.

Turner v. American Security & Trust Company, 213 U. S. 257; 53 L. Ed. 788.

Reininghaus v. Merchants' Life Association (Iowa) 89 N. W. 1113.

Looney v. Parker, (Iowa) 230 N. W. 570.

Lilly v. Kansas City Rys. Co. (Mo. App.) 209 S. W. 969.

Benson v. Smith (Mo. App.) 38 S. W. (2d) 749.

San Antonio Traction Co. v. Flory (Tex. Civ. App.) 100 S. W. 200.

Missouri, K. & T. Ry. Co. v. Gilcrease (Tex. Civ. App.) 187 S. W. 714.

Mielke v. Dobrydnio (Mass.) 138 N. E. 561.

Tyler v. Moore (Ore.), 226 Pac. 443.

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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CHARLES E. DYER, Administrator
of the Estate of OMEY E. DYER,
Deceased, and Charles E. DYER, *Appellants,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

BRIEF OF APPELLEE

Upon Appeal from the United States District Court for the District of Idaho, Eastern Division.

HON. CHARLES C. CAVANAH, *District Judge.*

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Filed....., 1932

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Appellee.

BRIEF OF APPELLEE

STATEMENT OF FACTS

Appellant's brief opens dramatically with the statement that Omey E. Dyer, the insured, worked and died—but as to *what* caused his death, appellant, and his evidence, are strangely silent—nor does either claim that his work resulted in his death, so that the cause of death is left to the same speculation and surmise, without basis in evidence, as the alleged existence of total permanent disability before lapse of the policy of War Risk Insurance.

Since the principal question is whether the trial court was justified in directing a verdict for the United States, and this involves a consideration of *all* the evidence, it is not necessary to set out the evidence in a statement only

to repeat it in argument. The Statement in appellant's brief cannot be accepted as complete, however, as illustrated by omission (Brief, p. 13) of all testimony by plaintiff, insured's father, with whom he made his home after discharge, relating to insured's work for three years (Tr. 28-29) and (Brief, p. 14) most of the testimony by insured's "boss" and co-worker during the first three years after discharge, relating to insured's work (Tr. 49-51). On our part we shall earnestly endeavor to discuss fairly and fully *all* of the evidence which appears to be material to the issues.

PRELIMINARY MATTERS

For some reason not clearly understood (unless it be that some implication of government unfairness is sought), appellant has printed in the record a Demand for Production of Papers at Trial, which includes the service record of *plaintiff*, and in his brief (pp. 10-38) claims a demand to produce the service record of the *insured veteran* Omey E. Dyer, and refusal thereof. The plaintiff was *not* the veteran, but the beneficiary of the policy and administrator of the veteran's estate; so far as known, he never served in the World War, never had a service record, and if he had one it was utterly irrelevant in this case, which involved only the physical condition of his son, Omey E. Dyer. Nor was demand made at trial for the records of the veteran; it was for the records of Mr. Dyer, "We have demanded" referring therefore again to the plaintiff (Tr. 26). There was no refusal;

merely a statement that the government had no such record (Tr. 26) and there was no showing then or now that the government did have, nor how it would be relevant if it did, and had produced it.

As to the service record of Omey E. Dyer, the veteran and the insured, we are confident appellant's counsel will not deny, though it is not of record on the appeal, that on January 22, 1932, plaintiff notified defendant he would take the deposition of Hon. Patrick J. Hurley, Secretary of War, or Major General C. H. Bridges, Adjutant General, covering Omey E. Dyer's service, at Washington, D. C., where the records were said to be, on February 2, 1932. Thus he had opportunity to gain the information he sought; if taken, it was not offered by plaintiff, whether unfavorable or not, and if not taken, no reason appears why it was not.

By noticing deposition for Omey E. Dyer's service record, and demanding production of plaintiff's record, it is clear that counsel meant two different records—one, the plaintiff's, he demanded; the other and material one, he did not.

ARGUMENT

THE COURT PROPERLY DIRECTED VERDICT FOR DEFENDANT

The burden of proof in War Risk Insurance cases is upon plaintiff as in all other cases. So-called liberality of construction of the statutes or of the policy does not

justify substitution of sentiment for fact, or surmise, speculation or suspicion for substantial evidence supporting the issues. A plaintiff in this class of case is not relieved in any measure from the requirement that he shall, by substantial evidence, prove that the insured was, in fact, not merely totally disabled, but also permanently totally disabled during the life of the policy, and so remained. Nor is it sufficient to prove a total disability during the policy period, without proof of the permanency thereof, and then prove total disability from some other cause arising after the lapse of the policy, but overlapping the prior disability, even if the latter be proven to be permanent. A succession of totally disabling diseases, some before and some after lapse, do not justify a finding of permanent total disability before lapse, even though the succession continue throughout life. As illustration, one might be totally disabled from measles while the policy was in effect; before recovery, and after lapse, he might break his leg; before recovery from that, tuberculosis to the extent of permanency might develop, but this succession would not constitute permanent disability during the life of the policy. It would not be a continuance of the impairment of mind or body rendering it impossible for the insured to follow continuously a gainful occupation, which existed during the policy period, and against which the policy insured.

> " . . he must, in order to recover, present evidence definite and substantial enough to make the inference which he asks the jury to draw as to his condition

twelve years before, a reasonable one under the facts, *based on probabilities, not possibilities, something more than mere conjecture.*"

" 'Verdicts must rest on probabilities, not on bare possibilities. There is not capacity in any number of the former to create the latter . . . '

"Further, this evidence must not merely show that he was at the time of his discharge totally disabled, but that *he has continued and will continue to be so, not as the result of successive maladies making their onset from time to time, but as a result of the same malady, which then totally disabling, has continued and will continue permanently to be so. . . .*

"The Court erred in refusing to direct a verdict . . . . ."

U. S. v. Crume, 54 F. (2d) 556 at 558 (5th C.C.A.)

" . . . As to the influence of the supposed benevolent purpose of Congress in producing liberality of construction for these war risk contracts, apart from the consideration that courts sit to interpret the law and not to administer benevolence (*U. S. v. LeDuc,* (C. C. A.) 48 F. (2d) 789; *U. S. v. McPhee,* (C. C. A.) 31 F. (2d) 243, 245), a comparison of decisions construing war risk with those construing private disability policies will show very little, if any, difference in liberality of view. . . . "

U. S. v. Martin, 54 F. (2d) 554, 555 (5th C. C. A.)
U. S. v. McPhee, 31 F. (2d) 243, 245, (9th C. C. A.)

With these principles in mind, what disability, to what degree, and with what permanence, affected Omey E. Dyer prior to the lapse of his policy on May 31, 1919? The answer from the evidence is: no one knows.

Never during his lifetime, continuing for 10 years after discharge (Tr. 26), did Omey E. Dyer claim insurance benefits, or ask compensation, though he knew of them (Tr. 40), because of any disability occurring before lapse of the policy, during his service, or at any other time. Not until over a year after his death (Tr. 14) was any claim made for insurance benefits, and this was made by the administrator of his estate (for benefits designed for the veteran's support while living and disabled) and the beneficiary in case of death. Apparently the insured did not regard himself entitled, and went ahead supporting himself and a family acquired in 1923, four years after lapse of the policy (Tr. 54), by following a gainful occupation. He did not even change beneficiary from his father, who sues, to his wife or child, both of whom survived him (Tr. 35).

The foregoing, while negative, is indicative of Omey E. Dyer's own view of his rights and disabilities.

What other evidence was presented of pre-lapse total and permanaent disability? The plaintiff *pleaded* that "in November, 1918, the said Omey E. Dyer was crushed in and about the abdomen by a truck and underwent exposure to the elements and suffered from lack of shelter, food and water" (Tr. 13). But there was no evidence

that this occurred in November, 1918, or at any other time, nor does appellant claim in his brief that he offered any competent evidence to prove this as a fact, nor did he so claim at trial (Tr. 76-81). The most that was shown was that *he told* two physicians in the course of treatment, i. e., as history, and admissible therefore only as such in connection with the doctor's diagnosis, that "he had been injured in service" (Dr. Hunt, Tr. 62), or "injured in France, run over by a truck through here (indicating) over the stomach that way (indicating)" (Dr. Hampton, Tr. 69-70). This, of course, was no evidence of *the fact,* which was in issue and required competent evidence, but only evidence of his having said this. Had it been offered through any other witness than his physician, it would have been inadmissible as hearsay; through his physician treating him, it was admissible, not as proof of the fact of the injury, but as proof only that the physician was *told* this, and took it into consideration in his diagnosis or treatment, about the foundation for which the physician may testify. Hearsay from the mouth of a physician is proof of the telling only, not of the occurrence in fact of what was told, any more than it would be from the mouth of another; and after the evidence of telling is admitted, it does not by some magic grow into evidence of the occurrence itself.

But even if it reach the dignity of evidence that Dyer was run over at some unknown time, there is not one syllable of evidence, even history to his physicians, of what the effect was upon his physical condition, either before

or after lapse of the policy. The physician did not recite even any history from Dyer himself of any effects following the supposed accident, and, assuming the fact, the evidence shows no effects whatever, nor, if any effect, whether total or not, or permanent or not, before lapse of the policy.

Dr. Hampton did testify that being run over by a truck would be sufficient to cause the condition he testified he found, and in his opinion did cause it (Tr. 71, 72, 82), but the difficulty is that his answer was opinion only based upon an assumption of something as a fact which was not proven. Dr. Hunt did not try to make any connection between conditions he found in 1926 and the alleged truck injury, except to speculate that it *may* have occasioned some of them (Tr. 62), nor with any other conditions alleged to exist before policy lapse (Tr. 61-68).

> "A mere guess or statement of a witness, even though a so-called medical expert predicated upon no evidence or statement before the court to show continuity of condition . . . is of no value."
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> *U. S. v. Lesher,* 59 F. (2d) 53 (9th C. C. A.).

No proof was attempted of the pleaded exposure or suffering from lack of shelter, food and water; nor was any proof offered tending to show the pleaded hernia, hyperthyroidism or pharyngitis; nor the pleaded hypochlorhydria, unless it be the same as hyperacidity found not until 1926 (Tr. 62), and not connected back; nor the

pleaded Ileo Caecal Stasis. Apparently plaintiff pleaded a large part of the medical dictionary, and intended to let defendant, the court and the jury choose whichever met favor.

What other evidence of conditions prior to discharge (the date pleaded by plaintiff as marking beginning total permanent disability and his right to insurance payments) was produced? Well, George Thompson testified that about the first of February, presumably in 1919, he left Fort Douglas Army Hospital in the morning, and Dyer reached there about noon. Evidently he didn't see Dyer until later on a Sunday evening. Dyer was in bed and could hardly move, which was not strange, as Thompson says he was under the influence of ether. Why he was in bed or under ether, no one attempts to say. Apparently he had undergone no abdominal operation, for neither of the doctors who testified say anything about finding evidence of any previous operation (both gave careful physical examinations, and one operated for appedicitis—Tr. 62; 64, 70), nor, though plaintiff was rather keen about bringing out history as heard by the doctors, did they say that Dyer gave them a history of operation or even hospitalization; in fact, Dr. Hampton didn't know Dyer had been in a hospital before he was consulted, and would have been interested in the hospital doctor's findings (Tr. 84).

What the trouble was, then, is left to speculation; its extent or degree is left to speculation; its permanency, or possibility with care of cure, is left to speculation; the

effect, if any, of work upon it is left to speculation. But whatever it was, it was proved by plaintiff that it improved. Thompson says at Fort Douglas he saw Dyer occasionally; his face was all drawn, he was stooped and part of the time he walked with crutches; he complained of his stomach. Before discharge he was able to go without a cane (Tr. 45) and after discharge and by the time he went to work on the highway July 14, 1919, he had ceased to use a cane (Tr. 30, 34, 45, 46, 52). Dr. Hampton, the only doctor who gave an opinion relative to degree of disability before lapse of policy, did not give this history any weight in making his diagnosis—he did not know about it—and in answering the hypothetical question by giving an opinion dating total and permanent disability from discharge he gave it no consideration, since no part of it, save walking with a cane and the fact of being in a hospital for two months, was given, or assumed to be true, in the hypothetical question (Tr. 72-82; 84).

Dyer was discharged April 25, 1919; his policy lapsed May 31, 1919 (Tr. 26). Up to discharge no traumatic or other injury has been proven; an indefinite illness, wholly speculative as to kind or degree, has been suggested; from that he very clearly is improving. We will cover the remaining policy period. He returned to his father's home, there or in its vicinity to remain until 1921. He was there the first three months of his return, and his father, who testified, should have best known the outward manifestations of disease. *Yet he was never even asked to describe his physical appearance or alleged*

suffering during the remaining policy period or at any other time (Tr. 27-28). On the other hand, the father does show that he went to work and continued work steadily until in 1921, as a foreman in highway work at a considerably higher wage than others were getting (Tr. 28-29). This evidence plaintiff in his brief chooses to ignore. The father implies that at times Dyer came home from work sick, then would go to work again. But he was not asked to describe the sickness, nor how often it occurred, nor when it occurred, and one can only speculate about it, and about why one who should have been the best informed witness was not asked (Tr. 28).

It was left to others with but casual contact to attempt to describe his condition while the policy was in effect. Dyer is described by Springer, a merchant, as coming home from discharge on crutches or a cane, lighter in weight, bad complexion, pale, and complaining of pains in his stomach. Shortly after that he went to work on the highway and there remained until he went to Oregon (Tr. 30-32); similarly, Jones, a farmer, noticed just after discharge that Dyer was pale, stooped a little, used a cane, favored his side, was short of breath. After that he worked on the highway (Tr. 32-34). Wesley C. Thompson's testimony was similar (Tr. 46). Hoeffer, a farmer, observed at that time that he was sick, could hardly walk around, favored his side, was pale, weak, used a cane. Possibly, though indefinite, it was during this period that Dyer hauled fertilizer and had to stop and rest (Tr. 52-53). It is to be remembered that at this

time Dyer was convalescent from some indefinite, speculative, illness at Fort Douglas. No vomiting appears during this period. No traumatic injury occurred, so far as the testimony showed, *yet the only evidence*—an opinion—*of the totality and permanency of the condition before the policy lapsed is based upon the necessity of actual occurrence of traumatic injury during that time.* For Dr. Hampton, the only witness who tried to date total and permanent disability before policy lapse, in answer to a hypothetical question which assumed *no traumatic injury at all* (Tr. 72-81) based his opinion upon the assumption that Dyer was run over by a truck (which was not proven as a fact), and based his diagnosis when he examined Dyer after the lapse of the policy upon the occurrence of some injury and no injury was proved to have taken place before lapse, nor was it proven that the injury did *not* occur after lapse.

After giving his diagnosis of gastroptosis on July 28, 1919, after the lapse of the policy, the Doctor said:

> "Q. And would being run over by a truck, in your opinion, as he gave you in his history, be sufficient to cause that condition?"
>
> A. Yes.
>
> Q. In your oinion did it cause it?
>
> A. Yes." (Tr. 71).

But no proof, as hereinbefore stated, was ever presented that Dyer was run over by a truck before the lapse

of the policy, or that he was *not* run over *after* the lapse of the policy.

Again, as stated, the hypothetical question did not assume as fact the truck injury, but assumed the contrary. Over objection, the Doctor, however, used the incident as controlling.

"Q. You are not to assume as an actual absolute fact that he was run over by a truck, but you can assume that he gave you the history of it.

A. And answer on the history he gave me?

The Court. Yes.

A. I do. . . . .

MR. GRIFFIN. With that modification, may I have the same objection, your Honor, so I may preserve my record?

The Court. Yes, you can have the same objection, and it is overruled.

Q. You say you do. You say he was totally and permanently disabled at the time of his discharge within that definition?

A. Yes, sir.

Q. *And what in your opinion was the cause of his total and permanent disability?*

A. *According to his history, what he gave me, as being crushed by the truck.*

Q. And what evidence, doctor, of an injury of some kind did you find?

A. In giving him a thorough examination, I found his stomach and intestines down low, down in the hypogastric region.

Q. In your opinion was that caused by *some injury?*

A. *Yes, sir.* It was exaggerated more than a common type of gastro-enteroptosis (Tr. 81-82).

On cross-examination, with reference to this opinion, the following occurred:

"Q. You date this trouble, then, from this supposed being run over by a truck, *whenever that happened?*

A. According to his history.

Q. That is what you date it from in your opinion?

A. *I haven't any other way of dating it.*

Q. And you *don't know when* it happened?

A. No, sir.

Q. And *you don't know whether it ever happened,* do you?

A. *Only according to his own* statement.

Q. And you are simply assuming that is a fact?

A. Yes.

Q. And your whole opinion is based upon that being a fact, in fact?

A. On his history and my examination.

Q. Yes, *that is a material factor, is it not, in your determination you made an answer to this hypothetical question?*

A. *That is the way I take it.*

Q. *And if it was out of the question and wasn't a fact, and hasn't been proved as a fact, then there wouldn't be any way for you to date when the trouble started, would there?*

A. *I wouldn't give any date.*" (Tr. 83-84).

On this phase the doctor was produced to testify as an expert, not as a patient's doctor. The very foundation of his expert opinion was the actuality and time of an injury. When the foundation is removed, the opinion falls. The expert attempted to erect his opinion upon an imaginary foundation, neither proven nor assumed to exist, in fact, at any time.

> "A mere guess or statement of a witness, even though a so-called medical expert, predicated upon no evidence or statement before the court to show continuity of condition covering the period of total permanent disability, is of no value. The trial judge can say whether there is substantial evidence to support the hypothetical question, and, therefore the conclusion of the expert."
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> *U. S. v. Lesher*, 59 F. (2d) 53 at 55 (9th C. C. A.).

"A hypothetical question on which the opinion of an expert is to be based must include only such facts as are supported by evidence."
11 R. C. L., Sec. 11, p. 579.

"It scarcely needs the citation of authorities to sustain the proposition that a hypothetical question calling for expert opinion must be based on facts in evidence."
Phil. & R. Ry. Co. v. Cannon, 296 F. 302, at 306, (3d C. C. A.).
Union Pac. R. Co. v. McMican, 194 F. 393 (8th C. C. A.).

If the question must be based on facts in evidence, certainly the answer cannot be based upon facts neither in evidence nor stated in the question.

The foregoing, we believe, embodies all of the evidence properly assignable to conditions before the lapse of the policy. It shows not only no substantial evidence, but none at all, of an injury before lapse producing gastroptosis (or gastro-enteroptosis) upon which the pleading, and the first doctor (Dr. Hampton) based permanent and total disability; nor any substantial, or other, evidence that the injury responsible for the alleged total permanent disability did not occur between May 31, 1919, when the policy lapsed, and July 28, 1919, when Dr. Hampton discovered the alleged disability, gastroptosis. And it affirmatively shows that whatever condition Dyer was suffering from when he was in the Fort Douglas Hos-

pital, steadily improved without treatment until in July he was able to resume work, did resume work, and continued to work at a gainful occupation, and with substantially gainful returns, until 1928, nine years after the lapse of the policy.

This failure of policy period connection, or policy period totality, or policy period permanence, is alone adequate to support the ruling of the Court. But plaintiff's proof of subsequent history likewise supports it, because it shows (1) that Dyer suffered from a succession of diseases or conditions all arising after the policy lapsed, and (2) he did in fact from July 14, 1919 to the year 1928 engage continuously in substantially gainful occupations, and was neither totally nor permanently disabled.

Nor does this subsequent history disclose a condition unknown during the policy period but in fact then existing. The purpose and value of evidence of subsequent conditions is to show continuance of a total and permanent disability proven to exist in fact before the lapse of the policy, or to

> "disclose *the existence of conditions during the life of the policy not then known or recognized,* which would justify a conclusion that it had been reasonably certain while the policy was in force that the disability would continue throughout life . . . .
>
> " . . . . The subsequent events may be such in point of time or circumstance as to constitute evi-

> dence of the conditions upon which the disability existing during the life of the policy was based, but they are of no importance unless they do constitute such evidence, because they do not of themselves condition the right of recovery under the policy, which must depend entirely upon the conditions which existed when the policy was alive."
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> *Eggen v. U. S.*, 58 F. (2d) 616, 619.

First, as to succession of diseases after the policy lapsed. In June 1919, he was still getting better—he pitched hay for a while but couldn't go on. Why, or what condition arose is not disclosed (Tr. 33). By July 14th, he had so far recovered as to go to work on the highway as a workman and foreman in form building, working the same hours as the other men, nine hours a day, every work day, to and including July 26th (Tr. 28, 29, 31-32, 33-34; 46; 49-50). July 27th was Sunday. On Monday, July 28, he took sick (Tr. 47) and vomited incessantly (Tr. 70). There is no evidence of vomiting prior to this, except by inference from his bosses' statement that this was the third time he had been sick (Tr. 47). He was taken to Dr. Hampton (Tr. 47, 69) who found him weak, in a debilitated condition, anemic, thin, walking in a stooped position, complaining of pain in the stomach and epigastric region and back, and vomiting. Upon examination the doctor found gastroptosis (gastro-enteroptosis), a dropping down of the stomach and intestines, causing the symptoms, and resulting from some injury (Tr. 70-71; 72; 82). In his opinion he was at the time

he saw him, and thereafter, totally and permanently disabled on account and from the date of the injury (Tr. 71, 72, 82-84). When the injury, or gastroptosis resulting therefrom, occurred, he didn't know (Tr. 83), and no evidence was introduced showing. It is wholly speculative and may have occurred as well after May 31, 1919, as before. In the absence of evidence of its occurrence before, and absence of evidence of its occurrence after May 31, 1919, no foundation, no substantial evidence, exists for dating it prior to lapse. The most that can be said without guessing (and ignoring other factors hereinafter mentioned) is that Dyer was totally and permanently disabled from July 28, 1919, a date subsequent to lapse of the policy.

The doctor put Dyer on a light diet, and used an elastic belt to hold up his stomach as proper treatment and temporary relief. He wore it and worked until 1928 at what the doctor considered a substantially gainful occupation (Tr. 86-94). He considered him nevertheless totally and permanently disabled, not because he could not follow a substantially gainful occupation, but because he should not (Tr. 86, 88, 89, 90). He should not because work would aggravate the condition to the extent of bringing on vomiting and pain (Tr. 83).

He did not say (as in *U. S. v. Sligh,* 31 F. (2d) 735, cited by appellant), that work was "serious peril to the life or health of the insured," or (as in *U. S. v. Acker* 35 F. (2d) 646) would "substantially aggravate the ailment," and the most that can be said is that he would

work under handicap, which is not sufficient to justify recovery.

U. S. v. Seattle Title Trust Co., 53 F. (2d) 435 (9th C. C. A.).

U. S. v. Perry, 55 F. (2d) 819 (8th C. C. A.).

U. S. v. Thomas, 53 F. (2d) 192 (4th C. C. A.).

U. S. v. Wilson, 50 F. (2d) 1063, 1064, (4th C. C. A.).

Hanagan v. U. S., 57 F. (2d) 860 (7th C. C. A.).

U. S. v. Fly, 58 F. (2d) 217 (8th C. C. A.).

And any work performed (as we shall show) was *after* the lapse of the policy, so that if work is claimed to have been the cause either of totality or of changing a temporary total condition into a permanent total condition, the totality or permanency arose out of conditions *not existing* during the policy period, but arising thereafter, and absent the payment of premiums, cannot relate back and mature the policy.

Eggen v. U. S., 58 F. (2d) 616 (8th C. C. A.).

Nicolay v. U. S., 51 F. (2d) 170 (10th C. C. A.).

Roberts v. U. S., 57 F. (2d) 514 (10th C. C. A.).

Hirt v. U. S., 56 F. (2d) 80 (10th C. C. A.).

The most that *U. S. v. Sligh,* 31 F. (2d), 735, decided by this court, and other similar cases, can be construed to hold is that one who can work only at peril to life during the policy period is *totally* disabled; that is, that total disability may consist of (1) actual physical or mental inability, or (2) physical or mental disease of such a character that, though the sufferer is in fact able to work,

work will aggravate the condition to the peril of life or health. But the matter of permanency is not thus settled. It also must occur during the life of the policy, so that if, by treatment or proper care the condition may be ameliorated, i. e., is temporary, during the policy period, *it cannot be rendered permanent by conditions, for instance, work performed, arising afterwards.* Eggen v. U. S., *supra;* Nicolay v. U. S., *supra;* Roberts v. U. S., *supra;* Hirt v. U. S., *supra.*

In 1926, Dr. Hunt actually opened up the abdomen and could therefore *see* the conditions; he says nothing about finding gastroptosis or gastro-enteroptosis, but describes other conditions. These we will consider hereafter. In 1928 (the doctor testifies without notes and from memory, 1927 and 1928, but the other evidence makes it certain that Dyer was not in Idaho in 1927) Doctor Hampton again treated Dyer, found the same condition, gastroptosis, resulting from an injury, only worse (Dyer had accidents in 1926 and 1927—Tr. 65-66), considered him then total and permanent (Tr. 71-72, 90). In 1928, he sent Dyer to the Boise Veterans Hospital, for what condition the evidence does not disclose, and again we can only speculate (Tr. 94-95).

Continuing the history of his disabilities: During his work, from 1919 to 1921, he had spells of vomiting, some of which did and some did not lay him up. He also got sores in his mouth (Tr. 48-49). He was lighter in weight than before service, pale, limped (Tr. 35, 39, 54). From 1921 to 1928, he worked at the same work, or at con-

tracting, in Oregon. His partner, who was with him practically all the time from his discharge until a year before his death (Tr. 35, 39) first saw him too sick to work, at Roseburg, Oregon, in September 1922, at which time he had a sort of paralytic stroke, took an awful pain in the back, became almost paralyzed (Tr. 37, 39, 56). This is the first description of this sort of condition; another occurred in 1923, and another in 1927 after he fell off a scaffold (Tr. 37, 39, 55). The first time he consulted a doctor was in 1923 (Tr. 40). In 1926 he also fell from a scaffold and was treated by Dr. Hunt after which he complained of his back (Tr. 39, 40, 65, 66). During the partnership, he had vomiting spells (Tr. 38) and his partner's opinion was that about every 6 months he should have gone to the hospital or had a doctor's care (Tr. 39). After 1923 he consulted some doctors (Tr. 40). Dr. Hunt found a new set of conditions in 1926. He did not attempt to fix their origin or time. He first treated him for *nervous unrest* in February, 1926, seven years after lapse of the policy. Dyer gave a history of nervous difficulty since service (Tr. 62); he did not give such history to his first doctor, Dr. Hampton, and none of the witnesses, including Dr. Hampton, describe any such condition before 1921. To Dr. Hunt he also complained of weakness and general debility (Tr. 64). The doctor gave him a complete physical examination, and found *pyorrhea of the gums* (gingivitis), exuding pus or poison into the system, which was sufficient cause for his condition, and which he treated (Tr. 62, 64, 65). He consid-

ered Dyer totally disabled during his acquaintance, over a period of six months (Tr. 63, 67, 62). The doctor was not asked if Dyer was permanently disabled. When the pyorrhea began, no one knows—it is not pleaded—and again we speculate about a new disease.

About July 28, 1926, Dyer, while wheeling concrete on a scaffold, fell off, was injured, taken to the hospital, suffering superficial cuts and bruises and a sprained shoulder and back (Tr. 65-66). While in the hospital, on August 2, 1926, Dr. Hunt operated for acute appendicitis, the result of localization of general infection of the alimentary tract, superinduced by a sluggish circulation through that portion of the bowel, and very likely contributed to by Dyer's enforced rest in bed. The condition of bowel stasis induced by adhesions that have been the result of internal injury may have produced a predisposition to appendicitis (Tr. 63, 64-66, 68). Appedicitis is not pleaded (Tr. 13), and is not claimed to have existed during the policy period.

But Dr. Hunt opened up the abdomen in the operation, and he says nothing of seeing the alleged gastroptosis of Dr. Hampton—the dropping down of stomach and intestines which one would expect to be observable. He did find adhesions, which were pleaded, but when they arose no one says. Again we speculate. In any event, they were of no medical importance, according to the doctor, who left them alone, except they may have induced a bowel stasis, predisposing to the appendicitis (Tr. 62, 63, 65, 66). At the operation, hyperacidity and chronic

indigestion were also first discovered—their inception or effect was not testified to (Tr. 62) and we continue our speculation. Perhaps these are the conditions pleaded as "hypochlorhydria" and "ileo caecal stasis", though no one says so.

We reiterate that so far as the evidence shows, Dyer's conditions were successive, different diseases or illnesses, most if not all arising subsquent to the policy period, and none, we expect hereafter to demonstrate more fully by his work record, reaching the stage of totality and permanency, either before or after policy lapse, justifying recovery. At most they constituted handicaps only. Taking them up as alleged: (1) crushing by a truck was not proved at any time; no injury during the policy period was proved by any evidence; lack of injury after the lapse of the policy and before the first diagnosis was not proven by any evidence; evidence of injuries in 1926 and 1927 was proven, but they were long after lapse of the policy; (2) exposure to the elements and suffering from the lack of shelter, food and water were not proven by any evidence; (3) the condition at Fort Douglas hospital before discharge was never defined, its degree or permanency was never established, and it was not pleaded—it was proved that it improved to an extent permitting steady labor; (4) hernia was never proved; (5) adhesions were proven in 1926, after lapse of policy, and duration never established—it was proved they were of little physical importance; (6) hypochlorhydria was never proved as such—if hyperacidity is the same, it was first noted in

1926, its degree and permanence not established; (7) ileo caecal stasis was not proven as such—if it is the same condition mentioned by Dr. Hunt, it was first noticed by him in 1926, and its degree and permanence not established; it and hyperacidity apparently resulted from pyorrhea, not pleaded, and date of origin not established; (8) gastro-enteroptosis, first diagnosed June 28, 1919, after lapse, by Dr. Hampton, as gastroptosis, thought to be of traumatic origin, and no injury date established within the policy period; not found on visual inspection at the operation in 1926; said by Dr. Hampton to exist in 1928; not established as total permanent except by the opinion of Dr. Hampton which is shown did not have the proper basis for totality under the decisions of the Court under the "perilous work" doctrine, and is contrary to physical facts in evidence, that is, the record of work; (9) hyperthyroidism, not proven by any evidence; and (10) pharyngitis, not proven by any evidence.

Lastly, the death of Dyer. Apparently the appellant desires some inference drawn from his reiteration that Dyer "worked and died" (Brief, pp. 9, 47, 52, 53). But there is no *evidence* of cause and effect, no evidence upon which to base legal inference, nothing but speculation as to cause of death; there is no explanation why evidence, in place of surmise, was not supplied. It was stipulated that he died May 1, 1929 (Tr. 26); his father testified that he died at Boise (Tr. 28), but there was no evidence of cause of death, and whether from some acute condition

or from some condition of long standing, whether induced by labor or the result of infection or contagion, no one testified.

Now, his record of employment. Beginning July 14, 1919, he worked with regularity, occasionally ill but how frequently or how protracted, not testified to, save that in a period of nearly two years (July 14, 1919 to April 1921, when he left for Oregon), he was observed in from 20 to 25 illnesses, some of which lasted a few hours, some longer, the period not stated, but from each of which he returned to work, first as a concrete form builder on highway construction, shortly as foreman, and always getting at least 15 cents an hour more than others, earning 65 cents to 75 cents an hour, working nine hours a day, in Bingham and Bonneville counties in Idaho. He was a very competent workman. On his first boss's (W. C. Thompson) recommendation, and after the diagnosis of Dr. Hampton, he was hired as a foreman at 75 cents an hour by another man, and handled a crew just the same as Thompson (Tr. 29, 32, 33-34, 46-51). The only time book produced showed work for the same hours as other men (Tr. 49-50). We have only a pure guess as to time off.

> "Q. And how about his being on the job or off it during the time he was working for you from 1919 to 1921?
>
> A. *I couldn't say,* but I would say that at the time we were at work, he would be off one fourth of the

time with this sickness. I would say about one fourth. *I couldn't tell you* exactly." (Tr. 48).

His father, with whom he made his home, and who should have known, neither said anything about it nor was he asked (Tr. 27-29). Thompson knew of his being sick only once for three or four days while Dyer worked for 5 months in Bonneville County (Tr. 48). His boss, Stone, in that county, did not testify (Tr. 51). Thompson only recalled one, perhaps two, sicknesses preventing work, from the fall of 1920 to April 1921 (Tr. 51), another period of several months. It is obvious that the periods of illness were only occasional and neither prevented working for any protracted times, nor were such as to prevent his employers continuing him in employ as a foreman over other men. At most he was handicapped somewhat, but certainly he was not totally disabled.

In 1921 he went to Oregon in the same capacity (Tr. 55). From 1921 to 1923, the work record is sketchy—he apparently worked at the same work, but certainly there is no evidence that during this period he did *not,* or could *not,* work, or even that he did work under handicap. There is no justification in the evidence for saying that during this period he was totally disabled, or that he was even handicapped, and absent proof to the contrary, we are entitled to a presumption that he did engage continuously in substantially gainful occupations. Nor is the presumption without support in the natural and proper inferences to be drawn from the fact of his marriage in 1923 (Tr. 54) indicating Dyer's own estimate

of his ability to support his wife, an estimate proved true by the evidence (Tr. 55-56), and from the fact that Gardner, who must have known his capacity because with him practically all the time from August 1919 until a year before his death (Tr. 39), entered into an equal basis contracting partnership in 1923, which continued until 1928 (Tr. 39; 41) indicating that his intimate associate considered him a desirable associate, able to contribute equally with himself. No other motive for entering into this arrangement appears from the evidence; lacking other compelling reasons, common experience teaches that men do not take totally and permanently disabled persons into equal partnership, especially where the partnership, as in highway subcontracting, contemplates physical and mental effort and labor.

We believe we are justified in saying that the evidence of plaintiff shows that Dyer from July 14, 1919 to 1923 could and did continuously follow a substantially gainful occupation, and certainly lacks substance to show that he could or did not.

So also from 1923 to 1928. The partnership engaged as subcontractors in concrete and form work on highways, continued in 1923, 1924, 1925, 1926 and 1927, on a 50-50 (equal division) basis, and as a profitable enterprise, for Dyer and his wife lived in the camps, their bills were paid by the partnership before division of the partnership profits, and Dyer's share of profits amounted to at least $2,000.00 each of these years. *Dyer made a liv-*

ing for himself and family for five years and in addition at least $2,000.00 *per year.* We say at least, because by inference in 1926 and 1927 more was made, since he made income tax returns those years, and he had the high exemption due a man with wife and child (Tr. 38, 39, 40-41; 55-56, 59). The partnership employed from 5 to 20 men, the partners doing the jobs that required special skill and high priced labor. Dyer was a very skillful carpenter, a very efficient workman, the only man on the job who could do certain things; Gardner handled the men principally and looked after the business in a general way (Tr. 58). They had many contracts (Tr. 59), most of the time under Mr. Dunn, for five years (Tr. 61).

During these years, the first time he was too sick to work was in September 1922, at Roseburg, Oregon; other occasions were in 1923 and in 1927, when he fell from a scaffold (Tr. 37; 39), another resulted from falling off a scaffold and appendicitis in 1926 (Tr. 39; 65-66). His partner, who appears to have known the most about him, *estimated* a total of but one year out of the nine, from discharge to 1928, when Dyer was sick in bed (Tr. 37), and under doctor's care a fourth of the time (Tr. 38), separated into occasions therefore, about once in six months (Tr. 39). From some of these periods must be deducted the special situations not attributable to any condition existing before lapse of the policy, namely, the gastroptosis found by Dr. Hampton in 1919; the pyorrhea found by Dr. Hunt for which he was treated some months; the fall from the scaffold in 1926; the appendici-

tis operation with attendant necessary recuperative period; the adhesions, hyperacidity and chronic indigestion; the falling from a scaffold in 1927.

The nervousness during partnership of which Gardner speaks (Tr. 37) was attributable to a non-policy period condition of pyorrhea (Tr. 63). Gardner and his wife speak of vomiting spells and limping and complaining of his back (Tr. 38, 40, 55). Dunn saw him nearly every day, but never saw him vomit (Tr. 60, 59).

The weight to be attached to lay opinions is illustrated by Dunn's diagnosis of kidney trouble, concerning which no doctor testified (Tr. 57-58), and his estimate that Dyer worked half the time (Tr. 58), when Dunn sometimes didn't see him for a week, couldn't tell whether he worked an entire day or not, couldn't say how long he was under doctor's care (Tr. 60), wouldn't know if he was off any extended length of time, he could be off part of a day and Dunn wouldn't know it, and Dunn could give no extended periods he was off (Tr. 61).

During this period, Dyer knew that if entitled he could get compensation from the government—he never made claim (Tr. 40); he never claimed his insurance, and he did draw several months compensation from a private company as a result of falling off a scaffold (Tr. 66-67).

We submit that the period from 1923 to 1928 can be added to the period of 1919 to 1923, and shows the continuous following, broken by occasional nonpolicy period

illness such as any person may suffer, and perhaps with some handicap, of a very substantially gainful occupation. We submit that the guesses and opinions of witnesses are unsubstantial in view of the physical facts.

> " 'When the testimony of a witness is positively contradicted by the physical facts, neither the court nor the jury can be permitted to credit it.' . . "Cases from many jurisdictions are gathered in a note in 8 A. L. R. 798, supporting the proposition that uncontradicted evidence which is contrary to physical facts should be disregarded. Judgments cannot and should not stand if they are entered upon testimony that cannot be true."
>
> *Woolworth Co. v. Davis*, 41 F. (2d) 342, 347, 8 A. L. R. 798.
>
> *Nicolay v. U. S.*, 51 F. (2d) 170.
>
> *U. S. v. McGill*, 56 F. (2d) 522, 524.
>
> *U. S. v. Crume*, 54 F. (2d) 556, 558.

So the rule in *U. S. v. Hairston*, 55 F. (2d) 825, at p. 827, is applicable:

> "If appellee had conceived himself to be totally and permanently disabled in 1919, he would hardly have waited until 1929 to bring action on the policy. The case apparently is an afterthought. . . . "

Of especial significance is the rule of this Court:

> "(The wife's) testimony consists largely of general statements as to the nervousness, irritability, and

various idiosyncrosies and eccentricities of the insured. The jury were no doubt justified . . . . in concluding that these symptoms were manifestations of the progress of the disease . . . *In view of the fact that during most of this period, the insured was actually engaged in working continuously at a gainful employment, the fact that his health was impaired does not indicate his total inability to perform such labor. U. S. v. Barker,* 36 F. (2d) 556; *U. S. v. Rice,* 47 F. (2d) 749."

U. S. v. Seattle Title Trust Co., 53 F. (2d) 435 at p. 437 (9th C. C. A.).

" . . . . it is to be conceded that, starting with the original infection of the inner ear while plaintiff was in the service, and as a consequence thereof he has suffered more or less from time to time with headache, nausea, and dizziness, and has had some fainting spells, there is a partial paralysis of one side of his face resulting from the second operation, and that the hearing of one ear is seriously impaired, . . . at the time the original policy lapsed he was not free from the infirmity . . . and that he has never fully recovered . . . and that as a consequence he has always been under a measure of disability and to some extent the disability will be permanent. *But upon the conceded facts we think it must be held as a matter of law that such disability was not at the time the policy lapsed, if ever, a total disability* . . . to hold total disability would be to do violence to any

common or reasonable understanding of the meaning of these terms."

U. S. v. Barker, 36 F. (2d) 556 at pp. 558, 559, (9th C. C. A.).

" . . . we have no desire to minimize the suffering and inconvenience resulting therefrom (service connected injuries). But we feel constrained to hold that *manual labor performed* by the appellee *for the period of five years following his discharge from the army and the compensation received for his services are utterly inconsistent with his present claim that he was totally and permanently disabled before the policy lapsed.*" . . .

"The foregoing undisputed facts would seem to demonstrate that there was a total failure of proof * a finding by the jury that the appellee was unable to do that which he had been doing almost daily for a period of more than five years is without support in the testimony. In so deciding we are not invading the province of the jury, we are simply declaring the law."

U. S. v. Rice, 47 F. (2d) 749 and 750 (9th C. C. A.).

In the foregoing cases, the claimed cause of disability was connected with the policy period; in this case it was not.

See also:

U. S. v. Wilson, 50 F. (2d) 1063, 1064 (4th C. C. A.).

U. S. v. Perry, 55 F. (2d) 819 (8th C. C. A.).
U. S. v. Thomas, 53 F. (2d) 192 (4th C. C. A.).
Hanagan v. U. S., 57 F. (2d) 860 (7th C. C. A.).

In the cases cited by appellant (*U. S. v. Lesher,* 59 F. (2d) 53; *U. S. v. Lawson,* 50 F. (2d) 646), the work was not really that of insured, but of his friends. No such evidence appears in this case. The facts in *U. S. v. Burke,* 50 F. (2d) 653, are entirely different from those here.

The trial court was not only justified in directing, but compelled by the facts to direct, a verdict for defendant.

THERE WAS NO PREJUDICIAL ERROR IN REJECTION OF EVIDENCE.

Complaint is made to the sustaining of objections to certain questions. Without conceding any error in these rulings, there was certainly no prejudicial error.

The witness Beulah Gardner was asked "Did he appear to be a sick man or a well man?" Objection was as follows:

> "Object to that question as leading, and furthermore, as conclusion of the witness. She could state how he appeared to her." (Tr. 54).

This was sustained. The question was leading, and did call for a conclusion. The witness did state elsewhere how he appeared to her, including that he was sick. She was capable of describing, and did describe, the external

manifestations of his condition, in detail, from which the jury could formulate the conclusion, which was their duty, not the witness's. She testified that Dyer "didn't look to be very strong, and he was nervous and pale, had a bad complexion. Sometimes his appetite was good and other times it wasn't good. When he would be sick, he wouldn't have any appetite at all. * * *lost considerable weight. He appeared to be exhausted * * tired easily when he worked. He did not engage in social activities to speak of. His color was pale—yellow. * * became worse * * * shaky * * did light work * * worked not more than one-half of the time * * tried to work and couldn't * * come in completely exhausted * * get completely out and be sick in bed for days * * sick in bed close to eighteen months * * in bed at home lots of times. He was under the doctor's care possibly about a year. I saw him taking medicine. I have seen him vomit —he would vomit blood * * couldn't hardly stand he would shake so. He walked like an old man * * always complained of his back and stomach." (Tr. 54-55). "condition grew worse * * wasn't able to do anything * * in the hospital at Boise for nine months." (Tr. 56).

Certainly this witness would have added nothing to the detailed *facts* by her opinion. Plaintiff was not prejudiced.

The witness John Gardner was asked, "What was his color, was it healthful, or otherwise, after he got out of the army?" Objection that the question called for a conclusion was sustained.

This witness had already described Dyer's color: "I saw him in August of 1919 after his return from the army. His physical condition looked to be very poor. He was pale." (Tr. 35). Later he testified, "He appeared to be a sick man." (Tr. 36). "There was a weakness in his condition, he was pale." (Tr. 39). In addition, the witness described other physical signs (Tr. 35-42). Nothing of value to the jury could possibly have been added by his conclusion, that a sick man who was pale, had an unhealthy color. There was no prejudice in the ruling.

The statement of witness Springer, "He looked like a sick man," was stricken as a conclusion (Tr. 30). This was only doing what counsel had himself asked: "Now tell us the facts, Mr. Springer, what you observed about Omey E. Dyer at that time. *Don't state any conclusions.*"

> "A. He was either on crutches or had a cane. * * He was much lighter in weight * * his complexion was bad and he looked like a sick man." (Tr. 30).

In view of counsel's own admonition of the witness, the answer might properly have been stricken as not responsive. This witness also was capable of describing and did describe Dyer's physical appearance from which the jury might draw its own conclusions. He testified that Dyer was on crutches, lighter in weight, bad complexion, pale, complained of pains in his stomach, never regained his

weight, had sores around his mouth, had weakness, coughing, short of breath, had to sit down and rest (Tr. 30-31).

Witness Dyer was asked "Did he work?" to which reply was "He helped around with me. *He wasn't able to go on.*" The italicized portion was stricken as a conclusion. It was a conclusion. In addition, it was not responsive, nor was it a conclusion in accord with the facts testified to by the witness, who stated that Dyer did go to work and worked "all that summer" as a foreman on the highway at higher than average wages, and continued as long as there was any road building in 1919; also in 1920 and 1921 (Tr. 28-29). He was never asked to describe any physical condition, either by statement of fact or conclusion; he was asked merely if Dyer worked, and his testimony fully covered the subject of the question. There was no prejudice in the ruling.

We submit that none of these rulings prejudiced the plaintiff. The witnesses described conditions observed, facts from which the jury, as was its right, could readily reach its own conclusions, and in which it would not be assisted by the conclusion of the witness. In addition, these matters were merely cumulative, others having fully described conditions. What Dyer looked like, sick or well (Tr. 28, 33, 35, 36, 37, 48, 49, 51, 58), what his color was, (Tr. 31, 33, 35, 39, 47, 52), whether he was able to work (Tr. 31, 33, 36, 37, 40, 41, 51, 52, 53, 54, 56, 58, 60, 63), were all testified to.

The rule permitting in exceptional cases the expression of opinion by non-expert witnesses was not applicable to the foregoing questions. The cases cited by appellant are not analagous: *Baltimore & Ohio R. Co. v. Rambo,* 59 Fed. 75, involved involuntary expressions of pain, admitted as verbal acts, and as

> "an inference from many minor details which it would be impossible for him to present in the form of a picture to the jury except by the statement of his inference or opinion."

Certainly the question of healthfulness of color, as asked John Gardner, does not meet this test. Nor since the exception is a rule of necessity, based upon inability to communicate to others a multitude of detailed conditions, many of which may be indescribable, is it applicable where conditions seen can be, in fact, described and communicated.

The case of *Parker et al v. Elgin,* 5 F. (2d) 562 cited by appellant involved an opinion on the peril of boys 500 feet from a street car. The Court held the opinion inadmissible and called attention to the necessity that it be "impossible to reproduce or describe in words every detail upon which the opinion of the witness is perdicated."

Connecticut Mutual Life Insurance Company v. Lathrop, 111 U. S. 612, *Mutual Life Insurance Company v. Leubrie,* 71 Fed. 843, and *Turner v. American Security & Trust Company,* 213 U. S. 257, cited by appellant, all relate to opinions on sanity, a well recognized exception;

Kiesel & Co. v. Sun Ins. Office, 88 Fed. 243, and *Fireman's Ins. Co. v. Mohlman Co.,* 91 Fed. 85, are fire insurance cases, the first being opinion on the time a roof fell, which was not allowed, the second being an opinion by experts as to when a building fell. The first points out that the matter is one of discretion in the trial court, and the danger of extension of the exception.

> "One witness may be able to make so graphic a word picture of a scene he has witnessed that those who hear it are in as good a situation to deduce a correct conclusion as he is; while another, who has observed the same incidents, may be utterly incapable of describing them, and can do nothing but state the impression or conclusion he drew from them. *The trial court sees and hears each witness, and in doubtful cases is far better qualified than the Court of Appeals to determine whether a witness should be confined to the facts, or should be allowed to state his conclusions.*"
>
> *Kiesel & Co. v. Sun Ins. Co.* 88 Fed. 243, 249 (8th C. C. A.).

Applying that rule, the court did not here abuse its discretion in view of the descriptive ability of all the witnesses, except the witness Charles Dyer (Tr. 27), whose answer was gratuitous, not responsive, contrary to facts testified to by him, and without attempt made to ascertain whether he could or could not describe conditions observed. Certainly it would be a dangerous practice to permit such opinions without a statement, as detailed as

possible for the witness to give, of the conditions observed upon which an opinion is based, and if the witness can, as here, describe conditions observed, the jury, to which is entrusted the duty of finding the ultimate conclusion, can do so without its province being invaded by the witness, whose opinion can add nothing to the facts described.

As further stated in the case last above noted, and cited also by appellant,

> "The general rule that facts, and not conclusions, should be stated, is a wise and salutary one, and cannot be too strictly followed. It tends to prevent fraud and perjury, and is one of the strongest safeguards of personal liberty and private rights. Whenever it is doubtful whether a case falls under the rule, or under one of its exceptions, the wise course is to place it under the rule; and, in our opinion, the court below made no mistake in following this course in the case before us."
>
> *Kiesel & Co. v. Sun Ins. Co.,* 88 Fed. 243, 249, (8th C. C. A.).

The questions and answers were properly excluded and there was no error therein; their exclusion was without prejudice because the witnesses, and other witnesses, described conditions, and their opinions and conclusions could add nothing of fact, and could but invade the function of the jury.

Lastly, there was no prejudice because assuming that the witnesses had been permitted to say that Dyer's color was unhealthful, that he was sick and that he was unable to work, it could not have changed the result of the facts in evidence upon which the Court determined correctly that a verdict should be directed for the defendant. These opinions would not constitute substantial evidence supplying the deficiencies of the proof to establish permanent total disability, nor overcoming the proof establishing ability to follow continuously substantially gainful labor, as more fully reviewed heretofore in this brief.

Respectfully submitted,

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No. 6863

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CHARLES E. DYER, Administrator of the Estate of OMEY E. DYER, Deceased, and Charles E. Dyer,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' REPLY BRIEF

Upon Appeal from the United States District Court for the District of Idaho, Eastern Division.

HON. CHARLES C. CAVANAH, District Judge.

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Filed....., 1933

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FILED

JAN 16 1933

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POINTS AND AUTHORITIES.

I.

PRELIMINARY MATTERS.

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Jones on Evidence, Second Edition, paragraph 1217, Vol. 3, page 2234.

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Damon v. Carroll, 163 Mass. 404, 408, 40 N. E. 185.

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United States v. McCoy, 193 U. S. 593, 598, 48 L. Ed. 805, 807, 24 Sup. Ct. Rep. 528.

Schlemmer v. Buffalo, R. & P. R. Co., 205 U. S. 1, 9, 51 L. Ed. 681, 685, 27 Sup. Ct. Rep. 407.

Neal v. Delaware, 103 U. S. 370, 396, 26 L. Ed. 567, 573.

Foster v. United States, 101 C. C. A. 485, 178 Fed. 165, 176.

Taplin & Rowell v. Harris, 90 Atl. 956 at 958 (Vt.)

Luckett v. Reighard, 248 Pa. St. 24, 93 Atl. 773, Ann. Cases, 1916 A. 662.

Murray v. Frick, 277 Pa. 190, 121 Atl. 47, 29 A. L. R., page 74 at 77.

VI.

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Philadelphia R. Co. v. Cannon, 296 Fed. 302.

Union Pacific R. Co. v. McMican, 194 Fed. 393.

United States v. Sligh, 24 Fed. (2d) 636.

Paragraph 445, Title 38 U. S. C. A., 1932 Cumulative Annual Pocket.

United States v. Sligh, 31 Fed. (2d) 735 (9th C. C. A.)

United States v. Worley, 42 Fed. (2d) 197 (8th C. C. A.)

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Foglesong v. Modern Brotherhood, 97 S. W. 240.

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Kerr on Insurance, paragraphs 285-386.

Beach v. Supreme Tent etc., 69 N. E. 281.

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United States v. Lesher (9th C. C. A.), 59 Fed. (2d) 53.

Parsons v. Bedford, 3 Pet. 433, 7 L. Ed. 732.

Barney v. Schmeider, 9 Wall. 248, 19 L. Ed. 648.

Walker v. New Mexico R. Co., 165 U. S. 593, 17 S. Ct. 421, 41 L. Ed. 837.

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Slocum v. New York Life Ins. Co., 228 U. S. 364, 33 S. Ct. 523, 532, 57 L. Ed. 879.

Gunning v. Cooley, 281 U. S. 90, 50 S. Ct. 231, 233, 74 L. Ed. 720.

I.

PRELIMINARY MATTERS.

Appellee criticizes the manner in which appellants opened their brief and states that the brief and record are strangely silent as to the cause of Omey E. Dyer's death. We urge that in the record there is an abundance of substantial evidence from which logical inferences can be drawn that the cause of Omey E. Dyer's death was due to the disability from which he was suffering when he came out of the Army.

Dr. Hampton treated Omey Dyer from the 28th day of July, 1919, until 1921 (Ts. 69). When the doctor first saw him he was weak and in a debilitated condition, very anemic, very thin, walked in a stooped position, he vomited incessantly (Ts. 70). This was caused by the dropping of the stomach and intestines and there wasn't any digestion, no peristaltic action to speak of (Ts. 70-71). That this condition continued until 1927 or 1928 is abundantly shown by the testimony of John A. Gardner (Ts. 34-41), Beulah Gardner (Ts. 53-56), C. A. Dunn (Ts. 56-61), and the testimony of Dr. Hunt (Ts. 61-69). Dr. Hampton attended him again in 1927 and 1928 and he sent him to the Boise hospital (Ts. 69) and found the same condition that he found when he first examined him on July 28, 1919, only it was aggravated worse (Ts. 72). Dr. Hampton also testified that the effect of Omey Dyer's working, as shown by the history of the case, was that if he tried to work it made this condition worse. Any men-

tal or physical work of any kind would aggravate the condition and the effect of his working and moving around would bring on this condition again—this vomiting and pain (Ts. 83). He also testified:

> "He came back to me in 1927 with the same condition existing, only worse, gradually getting worse and I say from the time I saw him in 1919, then again in 1927, his condition was worse." (Ts. 90)

And again he testified as to the effect of this work.

> "Q. Yes, that is what you said, that he could not do it, despite his history. Isn't that what you said?
>
> A. I said in my opinion he was totally and permanently disabled.
>
> Q. What do you mean by totally and permanently disabled?
>
> A. That he shouldn't work, and wasn't able to work, wasn't able to perform any duties, shouldn't be able to." (Ts. 90)

And again testified:

> "Q. When you sent him to the Boise hospital, what did you send him over there for—to the Boise Veterans Hospital in 1928.
>
> A. To see what they could do for him." (Ts. 94)

The doctor then testified also that when he had seen Omey E. Dyer in 1929 he found the same general condition of the stomach and bowels and at that time he re-

lieved him the best he could (Ts. 94-95). And it is admitted that he died May 1, 1929. (Ts. 26)

We believe that the fair inference from this testimony is that Omey Dyer died on account of the same trouble that he had when Dr. Hampton first saw him and that this condition continued from that time until his death and certainly the undisputed testimony of Dr. Hampton is that he should not have worked at all. Consequently, we believe we are justified in saying that this case comes squarely under the Carter case, 49 Fed. (2d) 221, which we quoted in the opening of our original brief as the principle of law underlying this entire case.

Comment is also made on the fact that the father, Charles E. Dyer, testified to certain facts. The fact is, as shown by the record, that Mr. Charley Dyer, the father, was deaf (Ts. 28) and couldn't hear very well (Ts. 29), and his memory was very poor (Ts. 28).

Comment is also made in appellee's brief, page 8, to the effect that the plaintiff demanded the service record of the plaintiff and not of Omey E. Dyer, the deceased veteran. The appellee is correct in this matter, for the record shows that on February 20, 1932, 20 days prior to the trial of this case, the plaintiff demanded the defendant to produce at the trial of this case, the service record of the plaintiff (Ts. 18-19). The inference to be drawn from the argument of the appellee on pages 8 and 9 of its brief is that the appellee did not understand that a demand was being made for the service record of Omey E. Dyer

and points out that the plaintiff was not the veteran, but the beneficiary, and that he never had a service record, and if he did, it was utterly irrelevant in the case, which only involved the physical condition of his son, Omey E. Dyer. If the appellee in this case desires to lead this court to believe that it was deceived by the wording of the demand and it did not produce the service record of Omey E. Dyer because it understood that a demand was being made for the service record of Charles E. Dyer, we are willing to allow the matter to rest in that situation. However, it will be observed that the complaint (Ts. 11-15) and answer (Ts. 15-17) make it clear that it was the insurance issued to Omey E. Dyer that was sued upon.

On page 9 of the record, appellee admits that it is going out of the record by calling attention to the fact that the plaintiff tried to take the deposition of the Secretary of War in order to secure a copy of the service record of Omey E. Dyer, which was in the appellee's possession. We doubt that it would be proper for us likewise to go out of the record and give the real reason why this deposition was not taken in time to be used in the trial of this case. Since the plaintiff made an effort to take the deposition of the Secretary of War, as stated by the counsel for the appellee, the only inference, it seems to us, that can be drawn is that the plaintiff's efforts to take the same were unsuccessful.

On page 12 of the brief, appellee states that Omey Dyer did not claim insurance benefits or ask compensation though he knew of them. The matter of the failure to

claim compensation has no place in this case, because as the Circuit Court of Appeals for the 8th Circuit said:

> "Not all soldiers claimed compensation, and the fact that such compensation may not be claimed is no evidence that the soldier might not have been entitled to it."
>
> United States v. Phillips, 44 Fed. (2d) 689.

Comment is also made on page 12 of the brief by appellee that a claim was not made for insurance benefits until the year after the insured's death. This, likewise, is a matter of argument before the jury and has nothing to do with whether or not there is substantial evidence in this case to support a verdict for, as was said in the Hayden case:

> "Like comment may be made upon the suggestion that evidently plaintiff did not think he was totally and permanently disabled or he would not have waited ten years to assert a right under the policy. These are all considerations for the jury."
>
> Hayden v. United States, 41 Fed. (2d) 614.

II.

THERE WAS NO SUCCESSION OF DISEASES.

On page 24, the appellee urged that there was a succession of diseases. We submit that this is not a proper inference to draw, as a matter of law, from the evidence. As we have heretofore pointed out in this case, the evi-

dence is clear, direct and positive to the effect that when Omey E. Dyer came back from the army he had a condition of the stomach and intestines caused by having been run over by a truck, which stayed with him throughout his life and caused his death.

The testimony of Dr. Hampton, which is undisputed, the appellee not having introduced any evidence, is conclusive that there was no succession of diseases after the policy lapsed, for the doctor testified from his personal knowledge that when he saw Omey E. Dyer in 1927 and 1928 he was suffering from the same condition that he found the first time he examined him, only it was aggravated (Ts. 71-72). He also testified after having read to him the complete history of Omey Dyer, that he was totally and permanently disabled at the time of his discharge from the army (April 25, 1919, Ts. 26, and the insurance was in force until May 31, 1919, Ts. 26; that his total and permanent disability was caused by being crushed by the truck (Ts. 82); and he found evidences of his having been injured manifested by his stomach and intestines being down low, down in the hypogastric region, and that this was caused by some injury. And then Dr. Hampton testified as follows:

> "Q. Doctor in your opinion, under this history I have read is it your opinion he continued to be totally and permanently disabled up to the time of his death?
>
> A. Yes.

Q. And the cause of that continuance was the same thing?

A. Yes, the same thing."

(Ts. 82-83)

On page 25 of appellee's brief, counsel argues that this case does not come under the Sligh and Acker cases, because Dr. Hampton did not testify that the work was a "serious peril to the life or health of the insured." Of course, Dr. Hampton did not use the words of the court in the Sligh and Acker cases, and, in our opinion, had he done so, this, in itself, would have cast a suspicion on his testimony. But he did testify substantially to the same effect and he testified that in view of the history of Omey E. Dyer that the effect of Omey Dyer's attempts to carry on the work he did was to make his condition worse, and that any mental or physical work of any kind would aggravate the condition and that his walking around would bring on this condition of vomiting and pain (Ts. 83). He also testified in regard to the work that was claimed by counsel for appellee, that the doctor didn't think that he should work at all (Ts. 89). And again he testified that he shouldn't work, that he wasn't able to work, wasn't able to perform any duties, shouldn't be able to (Ts. 90). Clearly, this brings this case under the rule laid down in the Sligh, Acker, Meserve, Burke, and Griswold cases.

III.

OMEY E. DYER'S WORK RECORD DOES NOT BAR RECOVERY.

On page 32, counsel comments on the work record of

Omey Dyer from 1919 until 1921. We have covered this in our opening brief, but desire to call attention again to the fact that during this whole period, Omey E. Dyer was under the personal treatment of Dr. Hampton and that he testified that Omey E. Dyer shouldn't have worked, that during that time he was totally and permanently disabled within the definition from personal observation (Ts. 69-71). This period is covered by the testimony of Wesley C. Thompson (Ts. 46-51).

On page 33 of the brief, counsel argue that the work period from 1921 to 1923 is "sketchey" and that there is no evidence that he did not or could not work, or even that he did work under handicap. His condition during this period is covered by the testimony of John A. Gardner (Ts. 34-41), who was Omey Dyer's brother-in-law (Ts. 35) and he did not keep up his end of the work (Ts. 41) and the testimony of Beulah Gardner (Ts. 53-56) and also the testimony of C. A. Dunn (Ts. 56-61).

Appellee also calls attention to the fact that Omey Dyer made a living for himself and family and earned $2,000.00 a year and claims that this was in addition to a living for himself and family. The record shows that the partnership of Dyer and Gardner made about $4,000.00 a year, and that Omey Dyer received about $2,000 (Ts. 39). But the record also shows that Omey Dyer did not keep up his end of the work (Ts. 41) and the evidence does not show that this was in addition to a living for himself and family. Furthermore, Mr. Dunn, who let the

contracts to this partnership, testified concerning Omey Dyer:

> "He wasn't on the work all the time, but his partner was, and it was on account of his partner that the contract was kept up, and we probably wouldn't have signed the contract if it hadn't been for his partner. He became tired easily upon exertion and he couldn't stand but just a little work" (Ts. 58).

IV.

THERE WAS AMPLE EVIDENCE THAT OMEY E. DYER HAD BEEN INJURED BY BEING RUN OVER BY A TRUCK.

At the trial of this case appellee contended that there was no evidence that Omey E. Dyer had been injured, or run over by a truck while in the service. Pages 12-24 of appellee's brief are devoted to this contention, and this seems to be the principal point relied upon by the appellee.

We believe that the trial court placed too much importance upon the cause of total and permanent disability for as we comprehend the law, it is not so much the cause of the condition as the condition itself. It has been held:

> "The real issue in the case was as to the existence of a permanent total disability prior to July 31st, 1919. The cause of such disability is not of vital importance. It is the disability within the insurance period and not the cause of it which gives rise to the

cause of action. The cause of action is one in contract and the contract does not require proof of the cause of the disability."

Green v. United States, 57 Fed. (2d) 9 (8th C. C. A.)

But in addition we urge that there was competent evidence in the record unobjected to, to show that Omey E. Dyer had been run over by a truck.

On pages 12 and 13 of appellee's brief, referring to the injury of Omey E. Dyer by being run over by a truck, it is stated:

"But there was no evidence that this occurred in November, 1918, or at any other time, nor does appellant claim in his brief that he offered any competent evidence to prove this as a fact, nor did he so claim at trial."

This statement by appellee is not true (Ts. 78-79). Appellee also admits on page 13 that the record does show that Omey E. Dyer told two physicians in the course of treatment that he had been run over by a truck and then states:

"This, of course, was no evidence of the fact which was in issue and required competent evidence but only evidence of his having had this."

On page 62 of the transcript it was testified to by Dr. Warren C. Hunt without any objection being made by the defendant of any kind or character as follows:

"At that time he (Omey E. Dyer) gave me a history of his trouble. His history was that of long standing nervous difficulty and dating from his war service, wherein he had been injured in that service. His back and chest had been injured and he had been unable to work steadily since that time, since he had been mustered out." (Ts. 62) * * *"He also stated he had been run over by a truck which caused the injury." (Ts. 62)

And Dr. Hampton testified in regard to Omey E. Dyer:

"He gave a history of being injured in France, run over by a truck through here (indicating), over the stomach that way (indicating)." (Ts. 69-70).

This testimony was admitted without any objection of any kind or character. In fact the attorney for the appellee on cross examination further developed this matter (Ts. 68). These two doctors were called for treatment only and they were not called at the time they treated Omey E. Dyer for the purpose of testifying.

Appellee on page 13 of its brief in regard to these statements made by Omey E. Dyer to his doctors, says:

"This, of course, was no evidence of the fact which was in issue and required competent evidence, but only evidence of his having said this. Had it been offered through any other witness than his physician, it would have been inadmissible as hearsay; through his physician treating him it was admissible not as

proof of the fact of the injury, but as proof only that the physician was told this, and took it into consideration in his diagnosis or treatment, about the foundation for which the physician may testify."

We take it by the above statement that it is conceded that statements made by the patient to the physician at the time the patient is undergoing treatment by the physician are competent and admissible.

Jones on evidence states the rule to be:

"He (the doctor) may base his opinions upon a statement given by the patient in relation to his condition and sensations, past and present. Thus only can the expert ascertain the condition of the party; and he may, of course, be guided to some extent by the data thus furnished. Furthermore, it seems that the testimony of a physician in this regard is not confined to opinion. Where it appears that the physician testifying was called by the injured person in his ordinary professional capacity and for purposes of securing relief from pain and for medical treatment, and there are no circumstances casting suspicion on the genuineness of the utterance, all statements of symptoms and sufferings, whether past or present, and though involving statements as to the nature of the accident, if necessary to diagnosis by the physician, may be testified to by him."

Jones on Evidence, Second Edition, paragraph 1217, Vol. 3, page 2234.

In the case of Coghill v. Quincy, O. & K. C. Ry. Co., a personal injury case against a railroad, wherein the injured person's doctor testified as to statements made by the plaintiff to him while undergoing treatment, and the Court said:

> "It is urged that this part of the testimony was, at least in some substantial degree, made up of what plaintiff told the doctor, and therefore it was hearsay and inadmissible. It is a familiar rule that, where a physician is treating a patient, inquiry of such patient is a necessity to intelligent treatment. The wholly unreasonable supposition that the patient, in such circumstances, would give him false information, relieves the communication from the objection ordinarily attaching to hearsay evidence. But it is said that, if the attendance of the physician is for the purpose of preparing himself as a witness in a case then pending, or expecting to arise, different considerations enter, for, in that instance, there will stand a temptation to falsity, or at least magnify, the true condition. (Citations). In this case, while it can be gathered from the record that the doctor's attendance upon plaintiff was more than a year after the injury was inflicted, yet it does not appear whether he waited upon plaintiff merely to qualify himself as a witness, or to prescribe for him as a physician. We cannot say there was error, when error has not been made to appear. Ordinarily a physician comes to learn his patient's trouble, both from the knowledge he obtains

from him and his own examination. It is proper he should."

Coghill v. Quincy, O. & K. C. Ry. Co., 206 S. W. 912.

V.

SINCE THE EVIDENCE CONCERNING THE INJURY RECEIVED BY OMEY E. DYER WAS ADMITTED WITHOUT OBJECTION, IT IS IN EVIDENCE FOR ALL PURPOSES.

We urge that since the evidence as to Omey E. Dyer's having been injured in France by being run over by a truck was admitted without objection or limitation that it is to be considered and given its natural probative effect just the same as any other evidence.

The Supreme Court of the United States has decided this matter where certain hearsay evidence was admitted in a criminal case and said:

> "So, of the fact that it was hearsay, it suffices to observe that when evidence of that character is admitted without objection, it is to be considered and given its natural probative effect as if it were in law admissible."
>
> Diaz v. United States, 223 U. S. 442, 56 L. Ed. 500.

If as the Supreme Court says, hearsay evidence which is admitted without objection is to be considered and given its natural probative effect, how much more probative

should be the testimony which it is claimed was hearsay, in this case where it was admitted without objection since the alleged hearsay consisted of statements made by a patient to his physician at a time when the patient was going to the physician for the purpose of securing treatment. The Supreme Court in the Diaz case above cited cites the following cases, to which we also refer:

Damon v. Carroll, 163 Mass. 404, 408, 40 N. E. 185.

Sherwood v. Sissa, 5 Nev. 349, 355.

United States v. McCoy, 193 U. S. 593, 598, 48 L. Ed. 805, 807, 24 Sup. Ct. Rep. 528.

Schlemmer v. Buffalo, R. & P. R. Co., 205 U. S. 1, 9, 51 L. Ed. 681, 685, 27 Sup. Ct. Rep. 407.

Neal v. Delaware, 103 U. S. 370, 396, 26 L. Ed. 567, 573.

Foster v. United States, 101 C. C. A. 485, 178 Fed. 165, 176.

See also Taplin & Rowell v. Harris, 90 Atl. 956 at 958 (Vt.)

In a Pennsylvania case, wherein it appeared that certain evidence was admitted which was unquestionably hearsay, but a motion was not made to strike it out, and the Judge commented upon it in instructing the jury, the Court said:

"The third assignment alleges error in that portion of the charge in which the court directs attention to

the fact that Mr. Schmeltz had testified he was the owner of the car which struck the plaintiff. There is no merit in this assignment. The testimony was before the court and the jury, and it was not only proper, but it was the duty of the court to direct the jury's attention to it. We have sustained the court's refusal to strike it from the record, and it was, therefore, competent testimony and to be considered by the jury."

Luckett v. Reighard, 248 Pa. St. 24, 93 Atl. 773, Ann. Cases, 1916A 662.

This ruling was later approved by the Supreme Court of Pennsylvania in Murray v. Frick, 277 Pa. 190, 121 Atl. 47, 29 A. L. R. page 74 at 77.

VI.

APPELLEE'S CASES ARE NOT IN POINT.

We will take up the cases cited in appellee's brief in the order in which they appear in the brief.

United States v. Crume, 54 Fed. (2d) 556 (Brief, page 11) does not help the appellee here, because in the Crume case the plaintiff's proof established that as a fact ever since his discharge he worked with some continuity, working sometimes 10 hours and sometimes 12 hours a day earning his livelihood, and further no medical proof was offered in support of his claim, and apparently the only doctor that did testify testified that the man was not totally and permanently disabled.

The case of United States v. Le Duc, 48 Fed. (2d) 789, is clearly distinguishable from the case at bar for the reason that Le Duc worked steadily from July 8, 1919, to September 29, 1919, and again for six weeks in the fall of 1919, then served about 20 months in the regular army and went to work again, and re-enlisted in the army in 1921, and deserted August 21, 1921, and then spent three years in a reformatory where he worked at manual labor in a stone quarry and did other work, and apparently there was no doctor produced who had ever seen Le Duc during his lifetime until December, 1925.

The next case cited, that of United States v. McPhee, 31 Fed. (2d) 243, is wholly unlike the case at bar. In the McPhee case the policy expired October 31, 1919. The evidence shows that McPhee went to work in September, 1919, and worked uninterruptedly until January, 1920, and testified "that he noticed some stiffness and pain in his shoulder in October or November, but it did not disable him, nor did he consult a physician with reference thereto." Clearly the plaintiff in that case could not recover on his own testimony and is wholly unlike the case at bar where the evidence shows that the veteran was in a hospital during service (Ts. 45) and went to see a doctor shortly after his discharge, which doctor testified he was totally and permanently disabled at that time.

The next case cited is that of United States v. Martin, 54 Fed. (2d) 554. The evidence in the Martin case showed that the man had worked practically continuously

since his discharge and that he had not consulted a doctor for five years. The court in the Martin case does say, however:

> "There are cases which rightly hold that notwithstanding one has worked continuously for long periods of time he might yet be found to be totally disabled if he has done the work upon sheer resolution, and at the risk or certainty of impairing his health or shortening his life."

And:

> "If Martin had shown either that he had worked though he was really not able to work, or that though able to work he had worked at the sacrifice of his health, we should not have felt warranted in disturbing the jury's verdict."

We submit that the case at bar comes under the above statements contained in the Martin case.

The next case cited by appellee is that of United States v. Lesher, 59 Fed. (2d) 53, and in this case this court affirmed the verdict of the jury where the evidence showed that the veteran had earned $4,080.00 from September, 1920, until September, 1922, and this court said:

> "The court does not weigh the evidence, but considers whether there is any or sufficient evidence to sustain a verdict. * * * And in war risk cases the most favorable construction should be given the evidence that is produced."

This is the principle which we contend should be sustained here. We did not ask a hypothetical question which was based upon a mere guess, but produced the first doctor that had treated the plaintiff after his discharge from the service and who had taken a history from the veteran while he was treating him, and the evidence that the veteran was injured by a truck went into the record without objection or without limitation, and as we have shown above, when it was so in the record, it was in for all purposes. Consequently it cannot be said that Dr. Hampton's opinion was based upon facts not proven. We have no quarrel with the rule of law that a hypothetical question upon which an opinion is to be given must include only a fair statement of such facts as are supported by evidence as is laid down in 11 Ruling Case Law at page 579, and in Philadelphia R. Co. v. Cannon, 296 Fed. 302, and Union Pacific R. Co. v. McMican, 194 Fed. 393.

The case of Eggen v. United States, 58 Fed. (2d) 616 cited at pages 23-24 of appellee's brief, is not in point, and can be readily distinguished from the case at bar upon the following grounds:

1. Eggen was discharged on August 24, 1919, and his own declaration, the certificate of his commanding officer and that of the medical officer who examined him are to the effect that he then had no disability.

2. His insurance lapsed October 31, 1919.

3. He was examined by a physician in September, 1919, "and that he then had symptoms indicating incip-

ient pulmonary tuberculosis; that he was advised to go to a sanitarium or to the Veterans' Hospital in order that he might be cured; that he did not go to the hospital or take any treatment, but worked intermittently on a farm, in the woods, for a wrecking company in Minneapolis, and as a section hand."

4. Apparently he was not again examined by a doctor until 1925 and was found at that time to have pulmonary tuberculosis in an advanced stage.

It will be seen from the above recitation of facts in the Eggen case that no doctor in the Eggen case testified that he was totally and permanently disabled while the insurance was in force, while in the case at bar we had the following medical testimony:

Dr. Hampton testified that on the 28th day of July, 1919, Omey E. Dyer came to his office for treatment (Ts. 69) and testified that he had no digestion owing to the condition of his stomach and intestines (Ts. 70), and also that at that time he was totally and permanently disabled (Ts. 71), and then on a history of the case testified that he was totally and permanently disabled at the time of his discharge (Ts. 82). That he found evidences of the injury (Ts. 82) and that any mental or physical work would aggravate the condition and would bring on this condition of vomiting and pain (Ts. 83). He also testified that the condition he found in 1919 was still there in 1927 and 1928 (Ts. 71-72). For the above reasons we do not believe that the Eggen case is at all in point here.

Further, the Eggen case seems to base its decision on the fact that the plaintiff had not filed his action for many years, thus overlooking the fact that Congress extended the statute of limitations after the decision of this court in the Sligh case, 24 Fed. (2d) 636, and that the report by the Senate Finance Committee, dated June 9, 1930, and known as Report No. 885 of the 71st Congress, second session, pointed out that many men were not familiar with their right to bring suit until after the old statute of limitations had run.

We assert that the Eggen case in some of the statements contained therein, whether necessary to the decision or not, violates the spirit of the Seventh Amendment to our Constitution, and contravenes the legislative policy of our Government as shown by the extensions of time granted to veterans for the filing of suits of this type. Paragraph 445, Title 38 U. S. C. A., 1932 Cumulative Annual Pocket.

Counsel also cites the case of United States v. Seattle Trust Company, 53 Fed. (2d) 435 (9th C. C. A.). This case is not at all similar to the case at bar, for the reason that in the Seattle Trust Company case the policy lapsed February 28, 1919, and the records show that the insured had worked from July, 1919, to June, 1920, and earned $1310.00, and then worked two months more in a garage, and then from the latter part of 1920 to the middle of 1924, and from the latter part of 1924 until 1925 he operated a theater, and this court said:

> "There is no medical testimony to the effect that the work or labor would aggravate his condition. On the contrary, the evidence tended to show that it probably was the best thing for him to have his mind occupied."

The testimony of Dr. Hampton in this case was to the effect that if he tried to work it made his condition worse; any mental of physical work of any kind would aggravate his condition and bring on the vomiting and pain (Ts. 83).

In the case of United States v. Perry, 55 Fed. (2d) 819, cited on page 26 of appellee's brief, the appellant worked ten years earning over $10,000.00 and was afflicted with a disease, for which work was beneficial rather than detrimental.

The case of United States v. Thomas, 53 Fed. (2d) 192, cited by appellee, is not in point at all because while the only medical evidence in the case showed that the insured could not do manual labor continuously, it did show that the man was not totally disabled from following other occupations or lines of work. Obviously that is not such a case as we have here for the reason that the evidence conclusively shows that Omey E. Dyer could not do any kind of work continuously, and that work or labor, either mental or physical, aggravated his condition.

The case of United States v. Wilson, 50 Fed. (2d) 1063, is not at all similar to the case at bar, for that case specifically shows that the insured went to work in the

textile mills, and worked practically continuously, up to the time of the trial, a period of eleven years, receiving about the same wages as others working with him at the same tasks. Obviously that case is not at all similar to the case at bar where the evidence shows that Omey E. Dyer was sick from the time he got back and it is admitted that he died May 1, 1929 (Ts. 26).

The case of United States v. Hanagan, 57 Fed. (2d) 860 (7th C. C. A.), is not in point here, for the reason that all the insured had in that case was an ankylosed knee, and he was able to walk without a cane, whereas in this case the testimony shows that the man's digestive system was seriously affected.

The case of United States v. Fly, 58 Fed. (2d) 217 is not in point here, for the reason that the facts showed that the veteran had worked at various jobs and had regular and continuous employment for 18 months immediately before the trial, and his employer testified that he performed the work satisfactorily.

The next case relied upon by the appellee is that of Nicolay v. United States, 51 Fed. (2d) 170. The facts in that case are clearly different. In the Nicolay case the policy lapsed for the non-payment of premiums on May 2, 1919. There was no medical evidence of any kind showing total and permanent disability at the time of discharge, and the evidence affirmatively showed that the insured was examined in January, 1922, by Dr. Owen, who took X-ray pictures and who believed him then to be

totally disabled because of chronic active tuberculosis, but Dr. Owen did not testify that he was totally and permanently disabled even in January, 1922. Nicolay was examined again in March, 1923, by Dr. Owen, who found chronic inactive tuberculosis, and he testified that he did not believe the insured to be permanently and totally disabled, and the court based its decision upon the distinct ground that the plaintiff's doctors had testified that the man was not totally and permanently disabled.

The next case cited and relied upon by the appellee is that of Roberts v. United States, 57 Fed. (2d) 514 (10th C.C.A.), in which case it appears that the insurance of the claimant lapsed October 31, 1919, and the insured worked from February, 1921, to May, 1921, and from May, 1921, to December, 1921, and from January, 1922, to May, 1922, at wages ranging from $20.00 a week to $90.00 a month, and from May, 1922, to October, 1928, worked at wages from $120.00 to $175.00 a month, and no doctor testified that the plaintiff was totally and permanently disabled at any time approximating the date when the insurance was in force.

In the case of Hirt v. United States, 56 Fed. (2d) 80, it appears that the insurance was in force to May 30, 1919. In April, 1919, the claimant was told by a doctor that his tuberculosis would be all right in six months if he had plenty of fresh air and rested. According to the record he did not consult a doctor again until November, 1924, and the plaintiff had worked more or less continu-

ously as a coal miner from about three weeks after he returned from the service until 1924.

The case of United States v. McGill, 56 Fed. (2d) 522, appellee's brief page 37, is clearly distinguishable from the case at bar, for the reason that in the McGill case apparently the plaintiff did not consult a doctor between the date of his discharge until 1927. Also there was proof without contradiction of continuous and gainful employment from July, 1919, to some time in 1922 and also employment thereafter.

The case of United States v. Hairston, 55 Fed. (2d) 825, is not applicable here for the reason that the first time the plaintiff saw a doctor was in January, 1922, almost three years after his discharge and no doctor testified that the plaintiff had ever been totally and permanently disabled.

The case of United States v. Barker, cited on page 38 of appellee's brief, is clearly distinguishable from this case because no real disability was disclosed and the insured had a long continuous work record and this court specifically said:

> "While some of the medical witnesses expressed the opinion that the infirmity was, at least in part, permanent, no one of them ventured to say that the disability was total."

And the plaintiff's own doctors testified that the insured was not totally and permanently disabled.

In United States v. Rice, the facts showed that the insured entered the employ of the railroad company as a common laborer and continued in that employment for two months, then in a store, and then worked for a railroad company continuously for four years.

We submit that the reading of the cases cited by the appellee in support of its contention that the direction of the verdict by the trial court should be sustained clearly illustrates the difference between the case at bar and those cases where the courts have held that there was no substantial evidence to support the verdict or the finding of the trial judge in directing a verdict.

The appellee introduced no evidence; Dr. Hampton's evidence is undisputed. In view of this record how can it be contended that there is no substantial evidence about which reasonable men might not differ? In view of the Seventh Amendment to the Constitution, how can a court say that the evidence in this case was not substantial, unless it does violence to the definition of total and permanent disability used in the insurance contract?

We believe that the principles of law contended for by appellee and the doctrine in the Eggen, Nicolay, Hirt and Roberts cases are too harsh; that they ignore the definition of permanent as being "based upon conditions which make it reasonably certain that it will last throughout the life of the person suffering from it" and that the definition provides for a recovery from permanent and total disability and the resumption of premium payments; that

they also ignore the rule that the statutes and regulations are to be construed liberally in favor of the veteran; and that such liberality of construction is the law cannot be questioned. See U. S. v. Sligh, 31 Fed. (2d) 735, (9th C. C. A.); U. S. v. Worley, 42 Fed. (2d) 197 (8th C. C. A.); U. S. v. Phillips, 44 Fed. (2d) 689 (2nd C. C. A.) U. S. v. Cox, 24 Fed. (2d) 944; Quirk v. U. S., 45 Fed. (2d) 631; Starnes v. U. S., 13 Fed. (2d) 212; White v. U. S., 270 U. S. 175; Mack v. U. S., 28 Fed. (2d) 602; U. S. v. Eliasson, 20 Fed. (2d) 821; U. S. v. Schweppe, 38 Fed. (2d) 595.

Instead of the Eggen and similar cases applying a liberal construction to the statutes and regulations, they have drifted back to an extremely strict and harsh construction and one that is not even applied to contracts of insurance issued by private insurance companies. Penn Mutual Life Ins. Co. v. Milton, 127 S. E. 140; Wenstrom v. Aetna Life Ins. Co., 215 N. W. 93; Foglesong v. Modern Brotherhood, 97 S. W. 240; James v. Casualty Co., 88 S. W. 125; Kerr on Insurance, paragraphs 285-386; Beach v. Supreme Tent etc., 69 N. E. 281; Storwick v. Reliance Life Insurance Co., 275 Pac. 550; Industrial Mutual Indemnity Co. v. Hawkins, 94 Ark. 417; 127 S. W. 457; 29 L. R. A. (N. S.) 635; 21 Ann. Cases 1029.

We also submit that in the Eggen and similar cases, the courts are overlooking the fact that the Constitution guarantees the right to a jury trial in a civil action, U. S. v. Lesher (9th C. C. A.), 59 Fed. (2d) 53, and are

also overlooking the fact that in a jury trial all that has ever been claimed for the trial or appellate court is the right to determine whther there is any substantial evidence (substantial as distinguished from a scintilla) to support a verdict and in jury trials it is neither the province nor the duty of the courts to pass upon the ultimate questions of fact. Obviously whether the courts are actually taking away from litigants the constitutional right guaranteeing a jury trial in a civil action depends upon the construction given by the courts to the word "substantial."

Knowing as we do that our Federal Courts are the greatest defenders of the Constitution we have, that the Federal Judiciary is the last resort for citizens who respect our Constitution, it is our solemn conviction that these same courts will be the last to invade that Constitution and violate its provisions under the guise of "no substantial evidence" and "evidence contrary to physical facts," when once their attention has been directed to the seriousness of the trend of their decisions.

We suggest that when a court is called upon to direct a verdict or set one aside on the ground that there is no substantial evidence to support the verdict that the court is placed in a difficult position. It must decide in a given case whether it is invading the Constitution of the United States and then decide what is substantial evidence, and in war risk insurance cases the evidence has to do with the ability of the human mind and body; with disease

mental and physical; with testimony lay and expert; with some diseases old as history and others recently named; but whether old or new, each one affecting the individual human being as a separate, distinct, operating industrial unit; and each capable of affecting one individual one way and another in a different manner and to a different degree.

Where is the line in a given case between deciding facts and deciding that there is no substantial evidence? We urge that in as much as the Federal Courts were created by the same Constitution that guarantees a jury trial in a civil action, and since they have been called upon to determine their powers under the Constitution to take cases from the jury, (Parsons v. Bedford, 3 Pet. 433, 7 L. Ed. 732; Barney v. Schmeider, 9 Wall. 248, 19 L. Ed. 648; Walker v. New Mexico R. Co., 165 U. S. 593, 17 S. Ct. 421, 41 L. Ed. 837; Capital Traction Co. v. Hof, 174 U. S. 1, 19 S. Ct. 580, 43 L. Ed. 873; Slocum v. New York Life Ins. Co., 228 U. S. 364, 33 S. Ct. 523, 532, 57 L. Ed. 879; Gunning v. Cooley, 281 U. S. 90, 50 S. Ct. 231, 233, 74 L. Ed. 720) that this self-determined power must give rise to a zeal to be absolutely sure that it is not extended to a point where it amounts in reality to a determination of the case on the merits; the danger, it seems to us, is that a determination that there is no "substantial" evidence or that the evidence is against the "physical facts" may actually become a determination that the plaintiff is not entitled to recover and that the *opinion* that the plaintiff should not recover is made the *decision* that there is no

substantial evidence. Since it is but a step from the "no substantial evidence" rule to the "not entitled to recover opinion," we know that the courts will be zealous to see that the Constitution is not invaded by the judiciary, for if error is committed, it is not error in the ordinary sense, but it is an invasion by the court of that very Constitution that creates the courts; the harm done the individual litigant against whom the error has been committed is one thing, but a greater wrong has been done the whole people by the destruction of their cherished rights.

Justice Storey more than one hundred years ago said:

> "The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. The right to such a trial is, it is believed, incorporated into and secured in every State constitution in the Union; and it is found in the constitution of Louisiana. One of the strongest objections originally taken against the Constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases. As soon as the Constitution was adopted, this right was secured by the seventh amendment of the Constitution proposed by Congress; and which received an assent of the people so general as to establish its importance as a fundamental guarantee of the rights and liberties of the people. This amendment declares that 'in suits at common law, where the value in controversy shall

exceed twenty dollars, the right of trial by jury shall be preserved; and no fact once tried by a jury shall be otherwise re-examinable in any court of the United States, than according to the rules of the common law.' "

Parsons v. Bedford, 3 Pet. 433, 7 L. Ed. 732.

Surely, since the taking of a case from the jury and the directing of a verdict involve the possibility of taking away a right that "is justly dear to the American people" and one that "has always been an object of deep interest and solicitude and every encroachment upon it has been watched with great jealousy" that the court will hesitate to enlarge upon the rule of "no substantial evidence" and evidence contrary to physical facts.

We submit that there was substantial evidence in this case to support a verdict and that the trial court committed error in directing the verdict for the appellee.

Respectfully submitted,

EARL W. CORY,
Residence: Blackfoot, Idaho,
and
JESS HAWLEY,
OSCAR W. WORTHWINE,
HAWLEY & WORTHWINE,
Residence: Boise, Idaho,
Attorneys for Appellants.

No. 6866

United States
Circuit Court of Appeals
For the Ninth Circuit.

19

PAN AMERICAN PETROLEUM COMPANY, a corporation,

Libelant and Appellant,

vs.

OIL SCREW BERGEN, her engines, machinery, boilers, boats, tackle, apparel and furniture, etc.,

Respondent,

STAR AND CRESCENT BOAT COMPANY,

Claimant and Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

No.

United States
Circuit Court of Appeals
For the Ninth Circuit.

PAN AMERICAN PETROLEUM COMPANY,
a corporation,

Libelant and Appellant,

vs.

OIL SCREW BERGEN, her engines, machinery, boilers, boats, tackle, apparel and furniture, etc.,

Respondent,

STAR AND CRESCENT BOAT COMPANY,

Claimant and Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

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INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italic; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

Names and Addresses of Proctors.

For Libellant and Appellant:

H. F. PRINCE, Esq.,
IRA C. POWERS, Esq.,
GIBSON, DUNN & CRUTCHER, Esqs.,
634 South Spring Street,
Los Angeles, Ctlifornia.

For Claimant and Appellee:

GRAY, GARY, AMES & DRISCOLL, Esqs.,
J. D. Spreckels Building,
San Diego, California.

IN THE SOUTHERN DIVISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA IN ADMIRALTY

°°°°°°°°°°°°°°

PAN AMERICAN PETROLEUM COMPANY, a corporation, Libelant, vs. OIL SCREW BERGEN, her engines, machinery, boilers, boats, tackle, apparel and furniture, etc., Respondent.	LIBEL FOR MATERIAL AND SUPPLIES

°°°°°°°°°°°°°°

To the Honorable District Court of the United States for the Southern District of California, Southern Division:

The libel of PAN AMERICAN PETROLEUM COMPANY, a corporation, against OIL SCREW BERGEN, her engines, machinery, boilers, boats, tackle, apparel, furniture, etc., and against all persons lawfully intervening for their interest therein in a cause of contract civil and maritime, alleges:

I.

That libelant is a corporation duly organized and existing and authorized to transact business in the State of California, and that the said vessel, her engines, machinery, boilers, boats, tackle, apparel, furniture, etc., is

now within the port of San Diego, San Diego County, within the Southern District of California.

II.

That during the months of September and October, 1928, libelant furnished and supplied to said vessel at the port of San Pedro, certain material and supplies, consisting of oil, gasoline, kerosene, amber diesel fuel and black diesel fuel of the reasonable and agreed value of Two Thousand Sixty-two and 31/100 Dollars ($2,062.31); that all of said material and supplies were furnished to said vessel by libelant upon the order and at the request of the master of said vessel and of one J. E. Heston, who was then the managing owner and agent of said vessel.

III.

That neither the owner of said vessel nor the agent nor the master have paid the said sum of Two Thousand Sixty-two and 31/100 Dollars ($2,062.31), or any part thereof, although demand therefor has been duly made, and that no part of said sum has been paid and the whole amount thereof, together with interest thereon from October 26, 1928, is due and owing to libelant.

IV.

That all and singular the premises are true and within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, libelant prays that process in due form of law according to the practice of this Honorable Court in cases of Admiralty and Maritime jurisdiction, may issue against oil Screw Bergen, her engines, machinery, boilers, boats, tackle, apparel and furniture, etc., and that all persons claiming any right, title or interest therein may be cited to appear and answer upon oath all

and singular the matters aforesaid, and that said vessel, her engines, machinery, boilers, boats, tackle, apparel and furniture, etc., may be condemned and sold to pay said sum of Two Thousand Sixty-two and 31/100 Dollars ($2,062.31), together with interest from November 10, 1928 and that said sum be paid to libelant and the proceeds of sale according to the order of this Honorable Court in such cases, and that libelant may have such other and further relief as in law and justice it may be entitled to receive.

GIBSON, DUNN & CRUTCHER,
By H. F. Prince
Proctors for Libelant.

Ira C. Powers
Of Counsel.

STATE OF CALIFORNIA,)
) ss:
COUNTY OF LOS ANGELES.)

AFFIDAVIT

G. P. LYONS, being duly sworn, deposes and says: That he is the Assistant Secretary of the libelant above named; that he has read the foregoing libel and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

G. P. Lyons

Subscribed and sworn to before me this 30th day of July, 1929,

[Seal] O. L. Weidman
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires June 17, 1933

[Endorsed]: No. 21-J Civil District Court of the United States In and for the Southern District of California Southern Division In Admiralty Pan American Petroleum Company, a corporation, Libelant, vs. Oil Screw Bergen, her engines machinery, boilers, boats, tackle, etc. Respondent. Libel for Material and Supplies

Filed Aug. 15, 1929 R. S. Zimmerman, Clerk by Edmund L. Smith, Deputy Clerk. Gibson, Dunn & Crutcher 1111 Merchants National Bank Building N. E. Cor. Sixth and Spring Sts. Los Angeles, Cal. Proctors for Libelant

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SOUTHERN DISTRICT OF CALIFORNIA, ss:

The President of the United States of America

To the Marshal of the United States for the Southern District of California, GREETING:

[Seal] WHEREAS, a libel in Rem hath been filed in the District Court of the United States for the Southern District of California, on the 15th day of August, in the year of our Lord one thousand nine hundred and twenty-nine, by Pan American Petroleum Company, a corporation, against OIL SCREW BERGEN, her engines, machinery, boilers, boats, tackle, apparel, furniture, etc., and against all persons lawfully intervening for their interest therein in a cause of contract civil and maritime, for the reasons and causes in the said Libel mentioned, and praying the usual process and monition of the said Court in that behalf to be made, and that all persons interested in the said OIL SCREW BERGEN or vessel, her tackle,

etc., may be cited in general and special to answer the premises, and all proceedings being had that the said OIL SCREW BERGEN or vessel, her tackle, etc., may for the causes in the said Libel mentioned, be condemned and sold to pay the demands of the Libelant.

You are, therefore, hereby commanded to attach the said OIL SCREW BERGEN or vessel, her tackle, etc., and to detain the same in your custody until the further order of the Court respecting the same, and to give due notice to all persons claming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said Libel, that they be and appear before the said Court, to be held in and for the Southern District of California, on the 3rd day of September, A. D. 1929, at 10 o'clock in the forenoon of the same day, if that day shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations on that behalf. And what you shall have done in the premises do you then and there make return thereof, together with this writ.

Witness, the Honorable Wm P James, Judge of said Court, at the City of Los Angeles, in the Southern District of California, this 15th day of August, in the year of our Lord one thousand nine hundred and twenty-nine, and of our independence the one hundred and fifty-fourth

R. S. ZIMMERMAN
Clerk.

By Edmund L. Smith
Deputy Clerk.

Gibson, Dunn & Crutcher
Proctor for Libelant.

In obedience to the within Monition, I attached the Oil Screw Bergen, etc therein described, on the 16th day of August, 1929, and have given due notice to all persons claiming the same, that this Court will, on the 3rd day of September, 1929 (if that day should be a day of jurisdiction, if not, on the next day of jurisdiction thereafter), proceed to the trial and condemnation thereof, should no claim be interposed for the same.

Dated August 16th, 1929

A. C. Sittel
U. S. Marshal.
By J. K. Wilson
Deputy.

Marshal's Fees	$2.30
Mileage	$
Expenses	$
Total	$2.30

[Endorsed]: Marshal's Civil Docket No. 9982 No. 21-J Civil United States District Court Southern District of California Southern Division Pan American Petroleum Company, etc., plaintiff vs. Oil Screw Bergen etc., defendants Monition returnable 2nd Sept., 1929 Gibson, Dunn & Crutcher Proctor for Libelant. Issued Aug. 15, 1929 Filed Sep. 16, 1929 R. S. Zimmerman Clerk. By M. L. Gaines Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

PAN-AMERICAN PETROLEUM COMPANY, a corporation, :	In Admiralty No. 21J
Libelant, :	CLAIM OF STAR &
vs. :	CRESCENT BOAT
THE OIL SCREW "BERGEN", her tackle, apparel, and furniture, :	COMPANY.

TO THE HONORABLE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF CALIFORNIA:

The claim of Star & Crescent Boat Company to the Oil Screw "Bergen", her tackle, apparel and furniture, now in the custody of the Marshal of the United States for the Southern District of California, at the suit of Pan-American Petroleum Company alleges:

That said Star & Crescent Boat Company is the true and bona fide owner of the said Oil Screw "Bergen", her tackle, apparel and furniture, and that no other person is owner thereof.

WHEREFORE, the claimant prays that this Honorable Court will be pleased to decree a restitution of the same to claimant and otherwise right and justice to administer in the premises.

GRAY, CARY, AMES & DRISCOLL
By J. G. Driscoll Jr.
Proctors for Claimant.

STATE OF CALIFORNIA)
) ss
County of San Diego)

O. J. HALL, being first duly sworn, deposes and says: That he is the President of the Star & Crescent Boat Company, claimant herein; that he has read the foregoing CLAIM OF STAR & CRESCENT BOAT COMPANY and knows the contents thereof, and that the same is true of his own knowledge.

O. J. Hall

Subscribed and sworn to before me this 18th day of August, 1929.

[Seal] Josephine Irving,
Notary Public in and for County of San Diego,
State of California

[Endorsed]: In the District Court of the United States, in and for the Southern District of California, Southern Division. Pan American Petroleum Company, a corporation, libelant, vs. The Oil Screw "Bergen", her tackle, apparel and furniture. In Admiralty No. 21 C. J. Claim of Star & Crescent Boat Company. Filed Aug. 19, 1929. R. S. Zimmerman, Clerk, by D. W. Ramsey, Deputy Clerk. Gray, Cary, Ames & Driscoll, attorneys at law J. D. Spreckels Bldg. San Diego, California, Proctors for Claimant

Premium charged for this bond is $10.00 per annum

IN THE CENTRAL DIVISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA
IN ADMIRALTY

°°°°°°°°°°

PAN AMERICAN PETROLEUM COMPANY, a corporation,

Libelant,

vs.

OIL SCREW BERGEN, her engines, machinery, boilers, boats, tackle, apparel, furniture, etc.,

Respondent.

LIBELANT'S STIPULATION FOR COSTS.

Stipulation entered into pursuant to the rules and practice of this Court.

°°°°°°°°°°

WHEREAS, a libel was filed in this Court the 15th day of August, 1929 by PAN AMERICAN PETROLEUM COMPANY, a corporation, against OIL SCREW BERGEN, her engines, machinery, boilers, boats, tackle, apparel, furniture, etc., for the reasons and causes in said libel mentioned, and the said Pan American Petroleum Company, a corporation, libelant above named, by G. P. LYONS, Assistant Secretary, and Columbia Casualty Company, an accredited surety company, surety for the libelant, hereby consenting that in case of default or contumacy on the part of the libelant, execution for the sum of Two Hundred Fifty Dollars ($250.) may issue against the parties hereto, their goods, chattels and lands.

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED, for the benefit of whom it may concern, that the stipulators undersigned are, and each of them is, hereby bound in the sum of Two Hundred Fifty Dollars ($250.), conditioned that the libelant above named shall pay all costs and expenses which shall be awarded against it by a final decree of this court, or upon an appeal, by the Appellate Court.

PAN AMERICAN PETROLEUM COMPANY,

[Seal] By: G. P. Lyons
Assistant Secretary.

COLUMBIA CASUALTY COMPANY,

By: C. E. Putnam
C. E. Putnam
Attorney-in-Fact

Attest: M. Eby
M. Eby Attorney-in-Fact

Examined and recommended for approval as provided in Rule 28.

A. M. Bradley
Attorney

I hereby approve the foregoing bond.

Dated: August 15, 1929.

R. S. Zimmerman, Clerk U. S. District Court
Southern District of California
By Edmund L. Smith, Deputy

State of California }
County of Los Angeles } ss.

On this 2nd day of August, A. D. 1929 before me, Marie Butler, a Notary Public in and for the county of Los Angeles, personally appeared C. E. Putnam, attorney-in-fact of the COLUMBIA CASUALTY COMPANY, to me personally known to be the individual described in and who executed the within instrument, and he acknowledged the execution of the same, and being by me duly sworn, deposeth and saith, that he is the said Attorney-in-fact of the company aforesaid, and that the seal affixed to the within instrument is the corporate seal of the said Company and that the said corporate seal and his signature as such Attorney-in-fact were duly affixed and subscribed to the said instrument by the authority and direction of the said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the city of Los Angeles, State of California, the day and year first above written.

[Seal] Marie Butler

Notary Public in and for said County of Los Angeles, State of California.

My Commission Expires Oct. 25, 1931

[Endorsed]: No. 21-J Civil District Court of the United States In and for the Southern District of California Southern Division Pan American Petroleum Company, a corporation, Libelant, vs. Oil Screw Bergen, her engines, etc. Respondent. Libelant's Stipulation for Costs Filed Aug. 15, 1929 R. S. Zimmerman, Clerk, by Edmund L. Smith, Deputy Clerk. Gibson, Dunn & Crutcher 1111 Fidelity Building N. E. Cor. Sixth and Spring Sts. Los Angeles, Cal. Attorneys for Libelant

IN THE SOUTHERN DIVISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA
IN ADMIRALTY

PAN AMERICAN PETROLEUM COMPANY, a corporation,	No. 21-C-J
Libelant,	
vs.	AFFIDAVIT OF SERVICE BY MAILING.
OIL SCREW BERGEN, her engines, machinery, boilers, boats, tackle, apparel and furniture, etc.,	
Respondent.	

STATE OF CALIFORNIA)
) ss
County of San Diego)

C. O. MEIER, being first duly sworn, deposes and says:

That she is an employee in the offices of Gray, Cary, Ames & Driscoll, proctors for respondent in the above entitled action; that the proctors for the libelant, to-wit: Gibson, Dunn & Crutcher reside in the City of Los Angeles, California, and have their offices therein; that said Gray, Cary, Ames & Driscoll have their offices in the City of San Diego, California; that affiant served the attached Answer to Libel and Interrogatories Attached Thereto upon said proctors for the libelant herein on the 21st day of September, 1929, by enclosing a true copy thereof in an envelope addressed to said Gibson, Dunn & Crutcher, 1111 Fidelity Building, N. E. Cor. Sixth and Spring Streets, Los Angeles, that being the address of said proctors for the libelant; that the postage on said envelope

was prepaid and that the same was by affiant on said 21st day of September, 1929, deposited in the United States Post Office in San Diego, California; that between the said City of Los Angeles and the said City of San Diego, California, there at all times herein mentioned was, and now is, a regular communication by mail.

C. O. Meier

Subscribed and sworn to before me this 21st day of September, 1929.

[Seal] Josephine Irving
Notary Public in and for the County of San Diego, State of California

IN THE SOUTHERN DIVISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA
IN ADMIRALTY

PAN AMERICAN PETROLEUM COMPANY, a corporation, Libelant,	No. 21-C-J
vs.	ANSWER TO LIBEL AND INTERROGATORIES ATTACHED THERETO.
OIL SCREW BERGEN, her engine, machinery, boilers, boats, tackle, apparel and furniture, etc., Respondent.	

To the Honorable, the Judges of the United States District Court for the Southern District of California, Southern Division:

The answer of the Star And Crescent Boat Company, now the owner of the Oil Screw "Bergen", to the libel

of the Pan American Petroleum Company in a cause of contract, civil and maritime, is as follows:

I.

Claimant admits the allegations contained in paragraph I of said libel.

II

Claimant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph II of said libel, and basing its denial on such ground denies each and all of the allegations in said paragraph contained.

III

Claimant admits that it has not paid libelant the sum two thousand sixty-two and 31/100 dollars ($2,062.31), or any part thereof, but has no knowledge or information sufficient to form a belief as to the other allegations contained in said paragraph III, and basing its denial on such ground denies each and all of the remaining allegations in said paragraph contained.

IV

Claimant admits the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court, but denies that all and singular the premises are true.

AND FOR A FURTHER ANSWER to said libel, and by way of a further and separate defense thereto claimant alleges:

V

That claimant is a corporation duly organized and existing under and by virtue of the laws of the state of California.

VI

That prior to the times mentioned in said libel during which it is alleged that materials and supplies were furnished to said vessel by libelant claimant was the owner of said Oil Screw "Bergen", and sold said vessel, its tackle, apparel, furniture, etc. to John E. Heston, and as a part of the consideration therefor said John E. Heston executed his promissory note bearing date the 1st day of July, 1927, payable to the order of claimant in the principal sum of forty thousand dollars ($40,000.00), and for the purpose of securing the payment thereof the said John E. Heston made, executed and delivered to claimant, as mortgagee, a preferred mortgage bearing date the 30th day of September, 1927.

VII

That in and by the terms of said preferred mortgage the said John E. Heston granted, bargained, sold, conveyed, transferred, assigned, mortgaged and set over to claimant the whole of said Oil Screw "Bergen", together with her engines, motors, boilers, machinery, masts, bowsprits, boats, anchors, cables, rigging, tackle, apparel, furniture, and all other appurtenances thereunto appertaining and belonging, provided that if the said John E. Heston should pay to claimant, as mortgagee, the said principal sum of forty thousand dollars ($40,000.00), together with interest thereon at the rate of seven per cent per annum, according to the tenor and effect of said promissory note, and should keep and perform all the covenants and conditions in said preferred mortgage contained, then the said mortgage and the estate and interest thereby created should cease and determine, otherwise to remain in full force and effect. That a copy of said pre-

ferred mortgage, marked Exhibit A, is attached hereto and made a part hereof as fully as though the same were herein set out at length.

VIII

That at the time the said preferred mortgage was made, executed and delivered to claimant, and during all of the times the materials and supplies were alleged to have been furnished by libelant to said vessel, the same was, and now is duly registered under the laws of the United State of America, having its home port in the port of Los Angeles, California.

IX

That said preferred mortgage was duly filed for record in the office of the Collector of Customs of the port of Los Angeles, the home port of said vessel, and the port nearest the residence of the owner of said vessel, and was duly recorded in said office of the Collector of Customs in Book 1349/1 of Mortgages, Page 18 et seq, at 3:10 P. M. on the 21st day of October, 1927, which said record shows the name of the vessel, the parties to the mortgage, the time and date of the reception of the mortgage, the interest in the vessel mortgaged, and the amount and date of maturity of the mortgage, in accordance with section 30, sub-section C of the Merchant Marine Act of the Congress of the United States of June 5, 1920.

X

Claimant is informed and believes and alleges the fact to be that said preferred mortgage was endorsed upon the documents of said Oil Screw "Bergen" in accordance with the provisions of section 30 of the Merchant Marine Act of June 5, 1920, and was recorded as provided by said

section 30, sub-section C of said Merchant Marine Act; that an affidavit was filed with the record of said mortgage to the effect that the mortgage was made in good faith and without any design to hinder, delay or defraud any existing or future creditors of the mortgagor, or any lienor of said vessel; that the original of said affidavit was attached to the original mortgage; that the said mortgage did not stipulate that the mortgagee waived the preferred status thereof. That all of the acts and things required to be done by said Merchant Marine Act of June 5, 1920, in order to give to the said mortgage the status of a preferred mortgage were either duly done, or caused to be done by claimant, or said John E. Heston, or said *said* Collector of Customs of the port of Los Angeles.

XI

The claimant is informed and believes and alleges the fact to be that the Collector of Customs of the port of Los Angeles upon the recording of said preferred mortgage delivered two certified copies thereof to the mortgagor, the said John E. Heston, who placed, and used due dilegence to retain one copy on board the Oil Screw "Bergen", and caused the said copy and documents of said vessel to be exhibited by the Master to any person having business with the vessel, which might give rise to a maritime lien upon said vessel, or to the sale, conveyance, or mortgage thereof, and at all times since then the Master of said vessel upon the request of any such person has exhibited to him the documents of said vessel, and the copy of said preferred mortgage placed on board thereof.

XII

That the said preferred mortgage stated the interest of the mortgagor in the Oil Screw "Bergen", and the interest conveyed or mortgaged, and before the same was recorded said mortgage had been acknowledged within the state of California, county of Los Angeles, before a Notary Public authorized by the laws of the state of California and of the United States to take acknowledgements of deeds within said county and state.

XIII

That in and by the terms of said mortgage it was and is provided as follows: "Neither the mortgagor nor the Master of the vessel shall have any right, power or authority to grant, incur or permit to be placed or imposed upon the property, subject or to become subject to this mortgage, any lien whatsoever other than for crews wages, wages of stevedores and salvage". That at no time did claimant authorize the said mortgagor nor the Master of said vessel to create, incur or permit to be placed or imposed upon the said vessel any lien whatsoever.

AND FOR A FURTHER ANSWER to said libel, and by way of a second and separate defense thereto claimant alleges:

XIV.

Claimant alleges upon information and belief that if any materials or supplies were delivered to said Oil Screw "Bergen", as alleged in the libel, the same were delivered for the purpose of being transported, and in fact were transported by said Oil Screw "Bergen" as a carrier or tender to various fish canners and fishing boats

being operated in waters off the coast of Lower California, and that the major portion of any such materials and/or supplies were delivered to said canners and said fishing boats and were not used by or benefitted said Oil Screw "Bergen".

WHEREFORE, having fully answered said libel, claimant prays to be hence dismissed at the cost of libelant.

GRAY, CARY, AMES & DRISCOLL
By J. G. DRISCOLL Jr.
Proctors for Respondent

STATE OF CALIFORNIA,)
) ss.
COUNTY OF SAN DIEGO,)

O. J. Hall, being first duly sworn, deposes and says: That he is the President of the Star And Crescent Boat Company, the owner of the Oil Screw "Bergen" named as respondent in the foregoing answer to libel; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

O. J. HALL

Subscribed and sworn to before me this 21st day of September, 1929.

[Seal] JOSEPHINE IRVING
Notary Public in and for the county of San Diego, State of California.

COPY

PREFERRED MORTGAGE

THIS MORTGAGE, made this 30th day of September, 1927, by and between JOHN E. HESTON of the City of San Pedro, California, hereinafter called the Mortgagor, first party, and STAR & CRESCENT BOAT COMPANY, a corporation, duly organized and existing under the laws of the State of California, hereinafter called the Mortgagee, second party:

WHEREAS, the Mortgagor is the sole owner of a certain motor vessel known as the "BERGEN", official No. 116,997, of about 247.98 gross tons and 132 net tons register; which vessel is more fully described in the certificate of registry, a true and correct copy of which is attached hereto; and,

WHEREAS, the Mortgagor is justly indebted to the Mortgagee in the sum of Forty Thousand Dollars ($40,000.00) upon the purchase price of said vessel; and,

WHEREAS, the Mortgagor has, for the purpose of securing the payment of said indebtedness and interest thereon, agreed to the execution and delivery of this preferred mortgage and the promissory note herein described to the said Mortgagee;

NOW THEREFORE, THIS MORTGAGE WITNESSETH:

That in consideration of the premises and the further sum of One Dollar ($1.00) to him duly paid by the Mortgagee at or before the sealing and delivery of these presents, and for other good and valuable considerations receipt whereof is hereby acknowledged, and in order to secure the payment of the said principal sum of Forty

Thousand Dollars ($40,000.00) and interest thereon at the rate of seven per cent. (7%) per annum, and of the said note and the performance of all the covenants and conditions herein, the Mortgagor has granted, bargained, sold, conveyed, transferred, assigned, mortgaged, set over and confirmed and by these presents does grant, bargain, sell, convey, transfer

EXHIBIT A

assign, mortgage, set over and confirm unto the Mortgagee, its successors and assigns the whole of said vessel, together with all her engines, motors, boilers, machinery, masts, bowsprits, boats, anchors, cables, rigging, tackle, apparel, furniture and all other appurtenances thereunto appertaining and belonging, and any and all additions, improvements and replacements hereafter made in or to the said vessel or any part or appurtenance or equipment thereof;

TO HAVE AND TO HOLD, the said vessel and all the appurtenances, improvements and replacements aforesaid unto the Mortgagee, its successors and assigns forever;

PROVIDED HOWEVER, and these presents are upon the express condition that if the Mortgagor shall pay or cause to be paid to the Mortgagee, or its assigns, the said principal sum of Forty Thousand Dollars ($40,000.00) and interest thereon at the rate of seven per cent. (7%) per annum by the payment of the following described promissory note in accordance with the terms and conditions thereof, and shall keep, perform and observe all and singular the covenants and promises in these presents expressed to be kept, performed and observed

by, or on the part of the Mortgagor, then this mortgage and the estate and rights hereby granted shall cease, determine and be void, otherwise to remain in full force and effect.

The aforesaid promissory note is as follows:

$40,000.00 San Diego, California, July 1, 1927.

In installments at the times hereinafter stated for value received, I promise to pay to the order of the STAR & CRESCENT BOAT COMPANY, at its office in the City of San Diego, State of California, in gold coin of the United States, the sum of Forty Thousand Dollars ($40,000.00) with interest on the amounts of principal remaining from time to time unpaid, at the rate of seven per cent. (7%) per annum, payable with installments of principal. Said principal sum shall be paid in forty (40) installments of One Thousand Dollars ($1,000.00) each, on the first day of the months of April, May, June, October, November and December, beginning with the first day of October in the year 1927, and continuing thereafter until paid. Should default be made in the payment of any of said installments of principal or interest when due the whole of the principal sum and interest remaining unpaid shall immediately become due and payable at the option of the holder hereof. This note is secured by a first preferred mortgage of even date, on the motor vessel "Bergen". Should an attorney be employed to enforce the collection of this note I agree to pay reasonable attorney's fees.

JOHN E. HESTON

The Mortgagor for himself, his heirs, executors and administrators hereby covenants and agrees to and with

the Mortgagee, its successors and assigns, to pay the principal amount aforesaid and the interest thereon, and to fulfill, perform and observe each and every one of the covenants, agreements and conditions hereinafter contained.

ARTICLE I.

The Mortgagor at his own cost and expense, so long as the said note hereby secured is outstanding, shall keep the vessel insured at its full insurable value, and in no event in a sum less than Twenty Two Thousand Five Hundred Dollars ($22,500.00) lawful money of the United States. Provided however, that after the reduction of the principal sum of said note to an amount less than Twenty Two Thousand Five Hundred Dollars ($22,-500.00) the amount of insurance may thereafter be reduced to a sum equal to one hundred per centum of the amount remaining unpaid on said principal sum. The Mortgagor shall also at his own expense keep the vessel fully entered in a protection and indemnity association or club in both protection and indemnity classes or covered in the amount above specified by protection and indemnity clauses of like effect in marine insurance policies.

Said marine insurance shall be placed with responsible underwriters in good standing and satisfactory to the Mortgagee under the American Hull Underwriter's Association form of policy insuring against the usual risks covered by such policies and having a deductible average not exceeding five per centum of the insured value, or under such other form as the mortgagee shall approve.

All losses shall be made payable to the Mortgagee for distribution by it (within thirty (30) days after the receipt of the same) to the Mortgagor and the Mortgagee as their interests may appear.

ARTICLE II

The Mortgagor shall not do any act nor voluntarily suffer, or permit any act to be done, whereby any insurance is or may be suspended, impaired or defeated, and shall not suffer or permit the vessel to engage in any voyage, or to carry any cargo not permitted under the policies of insurance in effect without first covering the vessel to the amount herein provided for by insurance satisfactory to the Mortgagee, for such voyage or the carrying of such cargo.

ARTICLE III

Neither the Mortgagor, nor the Master of the Vessel, shall have any right, power or authority to create, incur, or permit to be placed or imposed upon the property, subject or to become subject to his mortgage, any lien whatsoever other than for crew's wages, wages of stevedores, and salvage. The Mortgagor shall carry a properly certified copy of this mortgage with the ship's papers and shall exhibit the same to any person having business with the said vessel which might give rise to any lien other than for crew's or stevedores' wages, and salvage; The Mortgagor shall not suffer, nor permit to be continued, any lien, encumbrance, or charge which has, or might have, priority over this mortgage of the vessel to the Mortgagee; but in due course, and in any event within fifteen (15) days after the same becomes due and payable or enforceable against the vessel, shall pay, discharge, or make adequate provision for the satisfaction or discharge of all lawful liquidated claims or demands which if unpaid, might, in equity, in admiralty, at law or by any statute of this, or any other nation where the vessel may be navigating or berthed, have such priority over

this mortgage, or might operate as a lien, encumbrance, or charge upon the vessel, or cause detention in port.

If a libel shall be filed against the vessel, or if the vessel is otherwise levied against or taken into custody, or sequestered by virtue of any legal proceedings in any courts, the Mortgagor shall within fifteen (15) days thereafter cause the said vessel to be released and the lien to be discharged.

ARTICLE IV

At all times at his own cost and expense, the Mortgagor shall maintain and preserve the vessel in as good condition, working-order and repair, as the same may be at the date of the execution of this mortgage, so far as may be practicable, ordinary wear and tear and depreciation excepted.

ARTICLE V

At all times, the Mortgagor shall afford the Mortgagee, or his authorized representative, full and complete access to the said vessel for the purpose of inspecting the same and her cargoes and papers.

ARTICLE VI

The Mortgagor shall pay and discharge, when due and payable from time to time, all taxes, assessments, governmental charges, fines or penalties lawfully imposed upon the said property, subject or to become subject to this mortgage. The Mortgagor shall comply with and satisfy all the provisions of the "Ship Mortgage Act, 1920" and shall establish and maintain this mortgage as a first preferred mortgage under said Act. The Mortgagor shall not sell, mortgage, transfer nor change the flag of the vessel without the written consent of the Mortgagee first obtained, and any such written consent to any one sale,

transfer, mortgage or change of flag shall not be deemed or held to be a waiver of this provision in respect to any subsequent proposed sale, transfer, mortgage or change of flag. But the Mortgagor while not in default in the performance of any of the covenants, terms or conditions of this mortgage may, for uses lawful for American Vessels, charter the vessel subject to the lien and all the provisions of this mortgage to citizens of the United States as defined in the said Act.

ARTICLE VII

In the event this mortgage, or said promissory note, or any provisions thereof, be deemed invalidated, in whole or in part, by any present or future law of the United States, or any decisions of any authoritative courts thereof, the Mortgagor shall execute such other or further instruments as in the opinion of counsel for the Mortgagee will carry out the true intent and spirit of this mortgage.

ARTICLE VIII

In case any one or more of the following events, herein termed events of default, shall happen, viz.,

(a) default for more than fifteen (15) days after it falls due in the payment of any installment of interest upon said notes; or

(b) default for more than fifteen (15) days in the due and punctual payment of any installment of principal of said note after the same shall become due; or

(c) default in the due and punctual performance of any of the covenants, terms or conditions of this mortgage; or

(d) the Mortgagor shall sell, or attempt to sell, the vessel or any part thereof, or transfer the flag of the vessel without the written consent of the Mortgagee, or

the vessel shall be libeled, or levied upon, or taken by virtue of any attachment, or execution against the said Mortgagor, or otherwise subjected to liens or claims and not released within fifteen (15) days as herein provided, or the said Mortgagor shall remove, or attempt to remove, the vessel beyond the limits of the United States, save on voyage with the intent to return to the United States, or if legal proceedings are instituted to place the vessel, or any of the property of the Mortgagor, in the hands of a Receiver, Custodian or Trustee in Bankruptcy, or insolvency; then and in each and every such case the Mortgagee may:

(a) declare said note to be immediately due and payable, and said note shall bear interest thereafter at the rate of six per cent. (6%) per annum on the amount of principal and interest then due thereon;

(b) retake the vessel wherever the same may be found and hold, charter, operate, or otherwise use the vessel for such time and upon such terms as the Mortgagee may deem to its best advantage;

(c) retake the vessel wherever the same may be found and sell the same, free from any claims by the Mortgagee, in law, equity, admiralty or by statute, after first giving a printed notice for ten (10) consecutive days (excluding Sunday) in some newspaper of general circulation, published in the City of San Diego, State of California, and in some newspaper, if any is published at the place of sale, which said sale may be held at such place or places, and at such time or times as the Mortgagee may specify and may be conducted without bringing the vessel to the place of sale, and in such manner generally as the Mort-

gagee may deem to its best advantage, and with the right of said Mortgagee to become the purchaser at any such sale.

The happening of any of said events of default shall not authorize the Mortgagee to seek to charge other property of the Mortgagor, it being agreed that said motor vessel only shall be liable therefor.

ARTICLE IX

The proceeds of any sale and the net earnings from any management, charter, or other use of the vessel by the Mortgagee under the powers conferred by the preceding articles of this mortgage, together with the proceeds of any insurance and of any claims for damages on account of the vessel, received by the Mortgagee while exercising any of such powers, shall be applied as follows:

First: To the payment of all expenses and charges including the expenses of any sale, the expenses of any retaking, and any other expenses or advances made or incurred by the Mortgagee in the protection of his rights hereunder, and to the payment of any damages sustained by the Mortgagee from the default or defaults of the Mortgagor, with interest as provided for herein; and to provide adequate indemnity against liens claiming priority over this mortgage;

Second: To the payment of said note whether due or not due, with interest to the date of such payment;

Third: Any surplus thereafter remaining shall belong and be paid or returned to the Mortgagor.

ARTICLE X

No delay or omission of the Mortgagee to exercise any right or power accruing upon any default shall impair

any such right or power or shall be construed to be a waiver of any such default or acquiesence therein; and every power and remedy given by this mortgage to the Mortgagee may be exercised from time to time and as often as may be deemed expedient by the Mortgagee.

ARTICLE XI

All the covenants, stipulations and agreements in this mortgage contained are and shall bind and inure to the benefit of the Mortgagor and the Mortgagee, their respective heirs, executors, administrators, successors and assigns.

ARTICLE XII

Until default shall have been made in due and punctual payment of the interest or of the principal provided for in said promissory note, or until one or more of the events of default hereinbefore described shall happen, the party of the first part shall be suffered and permitted to retain actual possession of the vessel and to manage, operate and use the same and to collect, receive and enjoy the earnings, revenue, rents, issues and profits thereof.

IN TESTIMONY WHEREOF, the said Mortgagor has hereunto set his hand and seal this 30th day of September, 1927.

JOHN E. HESTON,
Mortgagor

Signed, sealed and delivered in the presence of:
GLENN B. DERLYSHIVE

STATE OF CALIFORNIA :
: ss.
COUNTY OF LOS ANGELES :

On this 30th day of September, 1927, before me, A. J. Musante a Notary Public in and for said County and State, came JOHN E. HESTON, known to me to be the person executing the foregoing Mortgage, who being by me duly sworn, did depose and say: That he resides at San Pedro, California; that he is the person whose name is subscribed to the foregoing mortgage; and he acknowledged to me that he signed, sealed, and delivered the said mortgage as his free and voluntary act, for the uses and purposes therein set forth.

GIVEN under my hand and notarial seal this 30th day of September, 1927.

(SEAL) A. J. MUSANTE

Notary Public in and for the County of Los Angeles, State of California. My commission expires March 20, 1931.

STATE OF CALIFORNIA :
: ss.
COUNTY OF LOS ANGELES :

JOHN E. HESTON, being first duly sworn, deposes and says: That he is the Mortgagor named in the foregoing mortgage; that said mortgage is made in good faith and without any design to hinder, delay or defraud any existing or future creditor of said Mortgagor or any lienor of the above mentioned vessel.

JOHN E. HESTON

Subscribed and sworn to before me this 30th day of September, 1927.

(SEAL) A. J. MUSANTE

Notary Public in and for the County of Los Angeles, State of California. My commission expires March 20, 1931.

STATE OF CALIFORNIA :
: ss.
COUNTY OF LOS ANGELES :

OAKLEY J. HALL, being first duly sworn, on oath, deposes and says: That he is the President of the Star & Crescent Boat Company, a corporation, the Mortgagee named in the foregoing mortgage, and that the controlling interest in said Star & Crescent Boat Company is free from any alien trust, or fiduciary obligation, and is owned by citizens of the United States; That said corporation is organized under the laws of the State of California, and that the President and Managing Directors thereof are citizens of the United States; that the title to the majority of the stock thereof is vested in such citizens, free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; and that the majority of the voting power of said corporation is vested in citizens of the United States.

OAKLEY J HALL

Subscribed and sworn to before me this 30th day of September, 1927.

(SEAL) A. J. MUSANTE

Notary Public in and for the County of Los Angeles, State of California. My commission expires March 20, 1931.

A True Copy of the Latest Certificate of Registry.

The United States of America
Department of Commerce
Bureau of Navigation

Permanent
Register No. 24E

Official No.
116,997
Letters
KQHW

Measured: San Diego, Calif. 1926
Rebuilt at San Diego, Calif. 1926
Remeasured: San Diego, Calif. 1926

Radio Call:
Service: Fishing
Number of Crew: 11.
Class of Engine: Oil
Engine I. H. P. 200

CERTIFICATE OF REGISTRY

In Pursuance of Chapter One, Title XLVIII "Regulation of Commerce and Navigation," Revised Statutes of United States,

C. C. Bruington, Foot of Broadway, San Diego, State of California, having taken and subscribed the oath required by law, and having sworn that the "Star & Crescent Boat Company" (incorporated under the laws of the State of California), the only owner of the vessel called the Bergen of San Diego, California, whereof Henry Olsen is at present master, and is a citizen of the United States, and that the said vessel was built in the year 1900 at Portland, Oregon, of wood, as appears by T E No. 113 issued at Los Angeles, California, Dec. 1, 1926, now surrendered, vessel name and trade changed,

and said enrollment having certified that the said vessel is a Gas Screw; that she has two decks, two masts, a plain head, and a round stern; that her register length is 90.7/10 feet, her register breadth 23 8/10 feet, her register depth 15 0/10 feet, her height ——— feet; that she measures as follows:

	Tons	100ths
Capacity under tonnage deck	236	05
Capacity between decks above tonnage deck	—	—
Capacity of inclosures on the upper deck, viz: Forecastle —; bridge —; poop —; break —; houses round 14.25, side — chart —, radio —; excess hatchways —; light and air —	14	25
Gross Tonnage	250	30
Deductions under Section 4153, Revised Statutes, as amended:		
Crew space, 10.49; Master's cabin, 3.22; Steering gear .90; anchor gear —; Boatswain's stores 13.71; Chart house —; Donkey engine and boiler —; Radiohouse 90; Storage of sails —; Propelling power (actual space 23.65) 175% 41.39	56	
Total Deductions	56	
Net Tonnage	194	—

The following- described spaces, and no others, have been omitted, viz: Forepeak —, aftpeak —, open forecastle —, open bridge —, open poop —, open shelter deck —, anchor gear —, steering gear —, donkey engine and boiler —, light and air 1.09, wheelhouse 3.38, galley 6.57, condenser —, water closets 2.02, cabins —.

and the said ——————————— having agreed to the

description and admeasurement above specified, according to law, said vessel has been duly REGISTERED at this PORT.

Given under my hand and seal, at the Port of San Diego, California, this 14th day of March, in the year one thousand nine hundred and twenty-seven.

W. H. WOOLMAN
Deputy Collector of Customs

Place for Seal of Naval Officer

No.
Comptroller of customs

Place for Seal of Collector

Commissioner of Navigation.

Seal of the Department of Commerce.

[Endorsed]: In Admiralty No. 21-J. In the Southern District of the United States District Court for the Southern District of California In Admiralty. Pan American Petroleum Company, a corporation, Libelant, vs. Oil Screw Bergen, her engine, machinery, boilers, boats, tackle, apparel, and furniture, etc., Respondent. Answer to Libel and Interrogatories Attached Thereto Filed Sep 23 1929 R. S. Zimmerman, Clerk By B. B. Hansen, Deputy Clerk Gray, Cary, Ames & Driscoll 1310 Bank of Italy Building, San Diego, California Attorneys for Respondent.

IN THE SOUTHERN DIVISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA IN ADMIRALTY

° ° ° °

PAN AMERICAN PETROLEUM COMPANY, a corporation, Libelant, vs. OIL SCREW BERGEN, her engine, machinery, boilers, boats, tackle, apparel and furniture, etc., Respondent.	No. 21-C-J STIPULATION OF FACTS

° ° ° °

IT IS HEREBY STIPULATED by and between the parties to the above entitled action that the following facts are true:

I.

That at all times mentioned in the libel herein the Pan American Petroleum Company, Libelant herein, and the Star & Crescent Boat Company, Claimant herein, were and now are corporations duly organized and existing and authorized to transact business in the State of California, and that the Oil Screw Bergen her engine, etc., Respondent herein, was at the time of the filing of the libel herein within the port of San Diego, San Diego County, in the Southern District of California.

II.

That during the months of September and October, 1928, Libelant furnished and supplied to respondent vessel at the port of San Pedro, in the County of Los Angeles, State of California, certain materials and supplies, consisting of oil, gasoline, kerosene, amber Diesel fuel and black Diesel fuel, of the reasonable and agreed value of Two Thousand Sixty-two and 31/100 Dollars ($2,062.31); that said materials and supplies were furnished to said vessel by Libelant upon eight separate written orders signed by John E. Heston, who was then the owner and managing agent of said vessel.. That said materials and supplies were delivered upon several different written purchase orders, seven of which were identical except as to date and description of the materials, with the following purchase order; No. 3896:

"PURCHASE ORDER
John E. Heston
Lower California Tuna Fisheries

Phone:
San Pedro 2658 No. 3896

Offices
Municipal Fish Wharf
Los Angeles Harbor
San Pedro, Cal.

Date 9-12-28

To Pan Amer. Pet Co. Charge to M/S Bergen
Deliver to M/S Bergen
Delivery desired not later than .....

Quantity	Article	Price	Amount
	Fill Lub. Oil Tanks		
1	#9 Lub. Oil	bbls.	
2	#7 " "	"	

1 #5 " " "
900 gals. Gasoline in
18 bbls. now aboard

John E. Heston
By: John E. Heston"

That purchase order No. 3978, dated October 25, 1928, was in the following words and figures:

"PURCHASE ORDER
John E. Heston
Lower California Tuna Fisheries

Phone:
San Pedro 2658 No. 3978

Offices
Municipal Fish Wharf
Los Angeles Harbor
San Pedro, Cal.

Date 10-25-28

To Pan. Am. Pet. Co. Charge to M/S Bergen
Deliver to M/S Bergen
Delivery desired not later than .....

" quantity	Article	Price	Amount

Fill Lub. Oil tanks #7
" Diesel Oil " Amber Diesel
5 bbls. #9 Lub.
2 " #7 "
50 bbls. Gasoline 50 gals per bbl.
50 " Black Oil (Diesel) 50 gals each
1 c/s 2/5 starting Gas (S.H. 4)
1 c/s 2/5 Kerosene (S.H. 4)
1 c/s 2/5 Starting Gas (U. S. E.)
2 c/s 2/5 Kerosene (U. S. E.)
1 bbl. Kerosene
3 bbl. #5 Lub.

John E. Heston
By: J. E. H."

That designations "(S.H. 4)" and "(U. S. E.)" referred to two smaller fishing vessels operated by the said John E. Heston, as stated in Paragraph III hereof.

That all of said materials and supplies were delivered to the respondent vessel in the Harbor of San Pedro, California, and a delivery ticket accompanied each delivery and was signed in each case either by the Captain or the Chief Engineer of the respondent vessel. That a true statement of the supplies and materials so furnished is attached to the Answer of Libelant to the interrogatories attached to Respondent's Answer, marked "Exhibit A" in said Answer, which is hereby incorporated herein the same as though specifically set out at length herein.

That as each order for materials or supplies was filled, the Libelant rendered to the said John E. Heston an invoice covering the order and that the said invoices so rendered were identical except as to date and the description of the materials with the following invoice, No. 3978:

"INVOICE

Pan American Petroleum Company
1835 East Washington Street
Telephone WEstmore 6241

Los Angeles
10-26-28

PAN-GAS
PANAM LUBRICATING
OILS AND GREASES

"Sold to Boat Bergen & Owners
John E. Heston
Acct. #1

Your Order No. 3978
Our Order No.
Our Invoice No. SP
16118

Shipped to San Pedro, Calif.

State License tax of three cents per gallon on "Motor Vehicle Fuel" is included in this invoice

Products	Quantity	Price	Amount	Total
Pan Am. M. O. #7	140 Gals.	.36½	51.10	
Black Diesel Fuel	1,563 "	.0274	42.83	
Amber Diesel Fuel	2,359 "	.0274	64.64	
				$158.57

Duplicate—Original Invoice furnished you by driver at time of delivery"

That photographic copies of said typical Purchase Order and Invoice are attached hereto, marked Exhibits "A" and "B" respectively, and made a part hereof.

III.

That the said Oil Screw Bergen was employed by said John E. Heston as a fishing tender to carry supplies to a fleet of fifteen smaller fishing boats operating in Turtle Bay off the coast of Lower California and to transport the catch of said fleet from Turtle Bay to San Pedro, California.

IV.

That of the materials and supplies so delivered to the respondent vessel there was actually used by said vessel 4768 gallons of gasoline of the reasonable and agreed value of $619.48, 6701 gallons of Diesel Fuel of the reasonable and agreed value of $184.18, 309.8 gallons of #9 lubricating oil of the reasonable and agreed value of $133.26, 675.3 gallons of #7 lubricating oil of the reasonable and agreed value of $246.48, 320.3 gallons of #5 lubricating oil of the reasonable and agreed value of $94.49, and 62.4 gallons of kerosene of the reasonable and agreed value of $9.36, making a total of $1287.61; that the remainder of the materials and supplies deliv-

ered to the respondent vessel, consisting of 3785 gallons of gasoline, 4370 gallons of Diesel Fuel, 170 gallons of #9 lubricating oil, 75 gallons of #7 lubricating oil, 60 gallons of #5 lubricating oil, and 30 gallons of kerosene, was transferred to the fishing boats comprising the fleet, owned and operated by said John E. Heston in Turtle Bay, and that said materials and supplies were delivered to the respondent vessel for the purpose of being transported to said fleet of fishing boats, and that for the carriage of the same the respondent vessel received no compensation by way of freight or otherwise.

V.

That the purchase price of said supplies and materials so furnished was due and payable immediately upon delivery of said materials and supplies. That no part of the sum of $2,062.31, representing the value of the materials furnished to said vessel; or of the sum of $1,287.61, representing the value of supplies and materials actually used by the respondent vessel, has been paid, although demand therefor has been duly made by respondent, and the whole of said amount, together with interest thereon at 7% per annum from October 26, 1928, is due and owing to Libelant.

VI.

That prior to the time when the said materials and supplies were furnished to said respondent vessel by Libelant, the Star & Crescent Boat Company, Claimant herein, sold the respondent vessel, its engine, etc., to John E. Heston, and as a part of the consideration therefor the said John E. Heston executed his promissory note bearing date the 1st day of July, 1927, payable to the order of Claimant herein, in the principal amount of

Forty Thousand Dollars ($40,000.). That for the purpose of securing the payment thereof the said John E. Heston made, executed and delivered to Claimant herein, as mortgagee, his preferred mortgage bearing date the 30th day of September, 1927. That a true and correct copy of said preferred mortgage, marked "Exhibit A" is attached to the Answer of Star & Crescent Boat Company, claimant herein, and made a part hereof as fully as though same were herein set out at length.

VII.

That at the execution and delivery of said preferred mortgage, and during the time during which the materials and supplies were furnished to respondent vessel by Libelant herein, said vessel was duly registered under the laws of the United States, having its home port in the port of Los Angeles, California.

VIII.

That said preferred mortgage was duly filed for record in the office of the Collector of Customs of the Port of Los Angeles, the home port of said vessel, and the residence of the owner of said vessel, and was duly recorded in said office of the Collector of Customs in Book 1349/1 of Mortgages, page 18 et seq., on the 21st day of October, 1927, which said record shows the name of the vessel, the parties to the mortgage, the time and date of the reception of the mortgage, the interest in the vessel mortgaged, and the amount and date of the maturity of the mortgage, in accordance with Section 30, subsection 3 of the Merchant Marine Act of June 5, 1920.

IX.

That said preferred mortgage was endorsed upon the documents of the respondents vessel, in accordance with

the provisions of said Act, and that an affidavit was filed with the record of said mortgage, to the effect that the mortgage was made in good faith and without any design to hinder, delay or defraud any existing or future creditors of the mortgagor or any lienor of said vessel. That the original of said affidavit is attached to the original mortgage. That the said mortgage did not stipulate the mortgagee waived the preferred status thereof. That all of the acts and things required to be done by said Merchant Marine Act of June 5, 1920, in order to give the said mortgage the status of a preferred mortgage under said Act, were duly performed or caused to be performed by claimant or the said John E. Heston or the said Collector of Customs in the said Port of Los Angeles.

X.

That the Collector of Customs for the port of Los Angeles upon the recording of said preferred mortgage delivered two certified copies thereof to the mortgagor, the said John E. Heston, who placed and used reasonable diligence to retain one copy on board the respondent vessel, and at all times the master of said vessel, upon any request of any person having business with the vessel, has exhibited the documents of said vessel, including the copy of said preferred mortgage placed on board. That the said preferred mortgage, prior to recordation, was acknowledged within the State of California, County of Los Angeles, before a Notary Public authorized by the laws of the State of California and of the United States to take acknowledgments of deeds within said county and state. That Libelant did not at any time mentioned herein have any actual knowledge of the execution or

delivery of said preferred mortgage or of the existence of the same.

XI.

That during the month of February, 1929, Claimant herein requested the said John E. Heston, who was then and for three months prior thereto had been in default in payments under the terms of said mortgage, to execute and deliver to Claimant a bill of sale of respondent vessel and to deliver the possession of said vessel to the Claimant. That after some negotiations the said John E. Heston and the Claimant herein entered into an agreement whereby the said Heston undertook to execute and deliver to Claimant herein a bill of sale of respondent vessel, provided the Claimant would accept the same in full payment of the indebtedness of said John E. Heston, and would cause to be fully satisfied, cancelled and discharged the preferred mortgage recorded in Book 1349/1 of Mortgages, page 18 et seq., as aforesaid, and deliver up to the said Heston his said note in the sum of Forty Thousand Dollars ($40,000.00); that thereafter and on or about the 1st day of May, 1929, and pursuant to said agreement, the said John E. Heston executed and delivered to Claimant herein a Bill of Sale of respondent vessel, and delivered the possession of said vessel to Claimant herein, and the Claimant herein delivered to said John E. Heston his said note in the amount of Forty Thousand Dollars ($40,000.) and caused the said preferred mortgage to be recorded in the office of the Collector of Customs, in Book 1349/1 of Mortgages, page 18, et seq., to be fully satisfied, cancelled and discharged and duly entered in the records of the office of the said

Collector of Customs a full satisfaction and discharge of said mortgage.

XII.

That during the negotiations between the said John E. Heston and claimant herein and prior to the execution or delivery of the Bill of Sale above referred to and the delivery of the possession of the respondent vessel to Claimant, certain conversations were had between the said John E. Heston and the said Claimant; that the parties hereto have been unable to agree as to whether during said negotiations Claimant was advised by the said John E. Heston of the approximate amount and character of the claim of the Libelant herein or what materials and supplies were furnished to respondent vessel; or was advised that the said Heston anticipated that Libelant would take action against respondent vessel, or that Libelant had not at that time instituted any action.

XIII.

IT IS HEREBY STIPULATED and agreed that at the trial of said action either party may offer evidence of the said conversations or any of them had between the said John E. Heston and the officers or agents of the Claimant, or any other evidence upon this issue; and that this action shall be submitted on the foregoing agreed statement of facts, together with such testimony as may be offered by the said parties as to said conversations, as far as they relate to the said disputed issue.

XIV.

It is understood and agreed that the parties hereto reserve the right to object to the admission of any fact or facts herein stipulated to, upon any ground upon which

said parties could object, if an attempt were made to prove such fact or facts on the trial of this action.

DATED: April 8, 1930.

GIBSON, DUNN & CRUTCHER,
By H F Prince
Proctors for Libelant.

GRAY, CARY, AMES & DRISCOLL,
By J. G. Driscoll, Jr.
Proctors for Claimant
Star & Crescent Boat Company

Form M-2-1m-10-26-Jones

PURCHASE ORDER No. 3896

Phone:
San Pedro 2658

JOHN E. HESTON
Lower California Tuna Fisheries
offices
Municipal Fish Wharf
Los Angeles Harbor
San Pedro, Cal.

Date 9-12-28

To Pan Amer. Pet. Co. Charge to M/S Bergen
Deliver to M/S Bergen
Delivery desired not later than _____

QUANTITY	ARTICLE	PRICE	AMOUNT
	Fill Lub Oil Tanks		
1	#9 Lub Oil	bbls	
2	#7 " "	"	
1	#5 " "	"	
900	gals Gasoline in 18 bbls now aboard In Recd 4907		

JOHN E. HESTON
By John E. Heston

"EXHIBIT A"

Form 4883
4512

INVOICE (CUT)

Pan American Petroleum Company
1835 East Washington Street
Telephone WEstmore 6241

PAN-GAS Los Angeles 10-26-28

PA AM LUBRICATING
Oils and Greases

Sold to Boat Bergen & Owners
John E. Heston
Acct. #1
San Pedro, Calif

Shipped to

Your order No. 3978
Our Order No.
Our Invoice No. SP16118

State License Tax of Three Cents Per Gallon On "Motor Vehicle Fuel" is included in this invoice

Products	Quantity	Price	Amount	Total
Pan Am M. O. #7	140 Gals.	.36½	51.10	
Black Diesel Fuel	1,563 "	.0274	42.83	
Amber Diesel Fuel	2,359 "	.0274	64.64	
				158.57

Duplicate—Original Invoice furnished you by driver at time of delivery

"EXHIBIT B"

[Endorsed]: District Court of the United States In and for the Southern District of California In Admiralty Pan American Petroleum Company, a corporation, Libelant, vs. Oil Screw Bergen, her engines etc., Respondent. Stipulation of Facts Filed Jun 5-1930 R. S. Zimmerman, Clerk, by M. L. Gaines, Deputy Clerk. Gibson, Dunn & Crutcher 1111 Fidelity Building N. E. Cor. Sixth and Spring Sts. Los Angeles, Cal. Proctors for Libelant

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF CALIFORNIA. SOUTHERN DIVISION. IN ADMIRALTY.

PAN AMERICAN PETROLEUM COMPANY, a corporation, Libelant,	No. 21-C-J
vs.	REQUEST FOR FINDINGS.
OIL SCREW BERGEN, her engine, machinery, boilers, boats, tackle, apparel and furniture, etc. Respondent.	

COMES NOW the libelant and, in accordance with the provisions of Admiralty Rule 46½, 28 U. S. C. A., Section 723, requests the court to make the following specific findings of fact herein, in addition to paragraphs I to XI, inclusive, of the stipulation of facts on file herein, and pursuant to Paragraphs XII and XIII of the said stipulation of facts and the evidence introduced upon the issues covered by the said paragraphs:

I.

The court finds with reference to the issues set forth in Paragraphs XII and XIII of the stipulation of facts herein that during the negotiations between the said John E. Heston and claimant herein, and prior to the execution and delivery of the bill of sale above referred to, and prior to the delivery of the possession of the respondent vessel to claimant, certain conversations were had between said John E. Heston and said claimant. That during the

course of said conversations, said claimant was advised by the said John E. Heston of the fact that libelant herein had furnished materials and supplies, consisting of gasoline, fuel oil and petroleum products, for the use of the respondent vessel, that a substantial portion of the purchase price of said materials so furnished and used by said respondent vessel had not been paid and that the said Heston anticipated that libelant would take action against respondent vessel, but that no action had at that time been instituted.

GIBSON, DUNN & CRUTCHER,
By Ira C Powers
Proctors for Libelant.

The foregoing proposed findings are not allowed except as incorporated in findings of fact and conclusions of law, made, signed and filed herein. Exception allowed to libelant.

Paul J. McCormick
Judge

Apr. 30, 1931.

[Endorsed]: No. 21-C-J. In Admiralty. In the District Court of the United States, for the Southern District of California. Southern Division. Pan American Petroleum Company, a corporation, Libelant, vs. Oil Screw Bergen, etc., Respondent. Request for Findings. Received copy of the within Request for Findings this 23rd day of April, 1931. Gray, Cary, Ames & Driscoll, proctors for claimant. Filed April 30th, 1931. R. S. Zimmerman, Clerk. by B. B. Hansen, Deputy. Gibson, Dunn & Crutcher 634 S. Spring Street. Los Angeles, Cal.

At a stated term, to wit: The January Term, A. D. 1931, of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court Room in the City of Los Angeles on Thursday the 16th day of April in the year of our Lord one thousand nine hundred and thirty-one

Present:

The Honorable Paul J. McCormick, District Judge.

PAN AMERICAN PETROLEUM COMPANY, a corporation, Libelant,	
vs.	No. 21-J Adm.
OIL SCREW BERGEN, her engines, machinery, boilers, boats, tackle, apparel and furniture, etc. Respondent.	

The libel herein is dismissed and a decree is accordingly ordered for the claimant with costs of suit herein. See Memorandum Opinion filed this day.

Dated at Fresno, California

April 16, 1931

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

– – o – –

PAN AMERICAN PETROLEUM COMPANY, a corporation, Libelant, vs. OIL SCREW BERGEN, her engines, machinery, boilers, boats, tackle, apparel and furniture, etc., Respondent.	No. 21-J IN ADMIRALTY

Attorneys For Libelant: Messrs. Gibson, Dunn & Crutcher of Los Angeles, California.

Attorneys For Respondent: Messrs. Gray, Cary, Ames & Driscoll of San Diego, California.

MEMORANDUM OPINION OF DECISION ON MERITS

This libel has been under consideration for some time. At the hearing and until the libelant cited Morse Dry Dock Co. vs. Northern Star, 271 U. S. 552, there appeared to be no question as to the invalidity and unenforceability of a maritime lien upon the vessel "Bergen". In the light of the evidence and the provisions of the "Ship Mortgage Act, 1920" and particularly subsection

R of Section 30 thereof. The language used by Justice Holmes in the main opinion of the Northern Star, Supra., has caused no little uncertainty as to the proper rule for this Court to follow in the decision of this matter. Upon mature deliberation of the evidence and analysis of the Northern Star case as well as upon examination of all of the other decisions cited by proctors, I have concluded that the language of Justice Holmes that has caused the uncertainty is dicta and does not control this libel. The ruling in the Northern Star was that the mortgage under consideration lost its preferred status and its paramount feature over other liens because of the failure of the mortgagee to comply with the conditions specified in the Ship Mortgage Act. It was therefore unnecessary to the decision for the Court to employ the language of Justice Holmes that affords the libelant herein the only refuge that it could possibly claim from the clear and unambiguous verbiage of the Ship Mortgage Act, and the explicit terms of the mortgage involved here. The separate opinion of Justice McReynolds in the Northern Star is an indication that unanimity did not exist in the Supreme Court as to the ineffectiveness of the clear language of the Ship Mortgage Act to defeat liens such as that claimed by the libelant herein.

In the proceeding at Bar, the mortgagor was the owner of the vessel "Bergen" and the mortgage was given to secure the payment of the purchase price of the ship. All of the formalities required by the Ship Mortgage Act were complied with and everything required to be done to give the mortgage the preferred status was accomplished. In Article III of the Mortgage it is provided: "Neither the Mortgagor, nor the Master of the Vessel,

shall have any right, power or authority to create, incur, or permit to be placed or imposed upon the property, subject or to become subject to his mortgage, any lien whatsoever other than for crew's wages, wages of stevedores, and salvage." And in Article VI of the mortgage, it is stated: "The Mortgagor shall comply with and satisfy all the provisions of the 'Ship Mortgage Act, 1920,' Vol. 41 U. S. Statutes at Large, 1005, which read as follows:

"Subsection P. Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

Subsection Q. The following persons shall be presumed to have authority from the owner to procure repairs, supplies, towage, use of dry dock or marine railway, and other necessaries for the vessel: The managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is intrusted. No person tortiously or unlawfully in possession or charge of a vessel shall have authority to bind the vessel.

Subsection R. The officers and agents of a vessel specified in subsection Q shall be taken to include such officers and agents when appointed by a charterer, by an owner pro hac vice, or by an agreed purchaser in possession of the vessel; but nothing in this section shall be construed to confer a lien when the furnisher knew, or by exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessaries was without authority to bind the vessel therefor.

It is clear from the foregoing that if libelant had exercised any diligence whatsoever it would have ascertained that the person ordering the supplies had by his own agreement in the documented and recorded mortgage precluded himself from making purchases that would operate to attach a lien against the ship or that would be effective in pledging the credit of the ship for the supplies. Common prudence would prompt one supplying merchandise to a ship in a transaction where it is sought to impose a maritime lien upon the vessel, to make some enquiry in the manner provided by statute to ascertain the ability of the person ordering the supplies to pledge the credit of the ship therefor. In this matter there is no evidence that the required diligence or prudence was exercised by the libelant and under such circustances to hold that it is entitled to a maritime lien would be to render wholly ineffectual and entirely meaningless, the applicable subsection R of Section 30 of the "Ship Mortgage Act, 1920."

The libelant is not entitled to a lien against the vessel "Bergen" under the stipulation of facts and the law applicable thereto and it is accordingly ordered that a decree be entered herein for the claimant and that the libel herein be dismissed with costs. Proctors for claimant will accordingly prepare and present such decree under the rules of this Court.

Dated at Fresno, California

April 16, 1931

Paul J McCormick
Paul J. McCormick
United States District Judge

[Endorsed]: No. 21-J Filed Apr 16 1931 R. S. Zimmerman, Clerk By B. B. Hansen Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

PAN AMERICAN PETROLEUM COMPANY, a corporation, Libelant,	No. 21-C-J In Admiralty
vs.	FINDINGS OF FACT AND
OIL CREW BERGEN, her engines, machinery, boilers, boats, tackle, apparel and furniture, etc., Respondent.	CONCLUSIONS OF LAW

The above entitled action having duly come on for trial on the pleadings and proofs of the respective parties; Messrs. Gibson, Dunn & Crutcher appearing for the libelant, Pan American Petroleum Company, and Messrs. Gray, Cary, Ames & Driscoll appearing for the claimant, Star & Crescent Boat Company; and the court having duly considered the law and the facts, and having heard the respective advocates, now makes its findings of fact as follows:

-I-

That the facts set forth in paragraphs I to XI, inclusive, of the Stipulation of Facts dated the 8th day of April, 1930, on file herein, are true; and said paragraphs of said Stipulation of Facts are hereby incorporated herein as fully as though set out at length.

-II-

That it is true that during the negotiations between the said John E. Heston and the claimant herein, and prior

to the execution and/or delivery of the bill of sale referred to in paragraph XI of said Stipulation of Facts and the delivery of the possession of the respondent vessel to claimant, certain conversations were had between the said John E. Heston and the president of the claimant corporation; that it is not true that during said negotiations said claimant was advised by the said John E. Heston of the approximate amount and character of the claim of the libelant herein, or what specific materials and supplies were furnished to respondent vessel; nor is it true that the claimant was advised that the said Heston anticipated that libelant would take action against respondent vessel.

AND AS CONCLUSIONS OF LAW from the foregoing findings of fact, the court finds:

1. That libelant acquired no lien against the respondent vessel, her engines, machinery, boilers, boats, tackle, apparel and furniture, etc.

2. That claimant, Star & Crescent Boat Company, is entitled to a decree herein dismissing said libel with costs of claimant.

Let Decree be entered accordingly.

Dated this 30th day of April, 1931.

Paul J. McCormick
United States District Judge.

[Endorsed]: In the District Court of the United States, in and for the Southern District of California, Southern Division. Pan American Petroleum Company, Libelant, vs Oil Screw Bergen, her engines, etc., Respondent. No. 21-C-J In Admiralty. Findings of Fact and Conclusions of Law. Received copy of within Findings this 23rd day of April, 1931. Gibson, Dunn & Crutcher by Ira C. Powers, attys for libellant. Filed April 30th, 1931 R. S. Zimmerman, Clerk, by B. B. Hansen, Deputy. Gray, Cary, Ames & Driscoll, attorneys at law. Bank of Italy Building, San Diego, California, attorneys for Claimant.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

PAN AMERICAN PETROLEUM COMPANY, a corporation, Libelant,	No. 21-C-J In Admiralty
vs.	FINAL DECREE
OIL SCREW BERGEN, her engines, machinery, boilers, boats, tackle, apparel and furniture, etc. Respondent.	

This action having duly come on for trial on the pleadings and proofs of the respective parties, and after hearing the respective advocates and due deliberation having been had thereon, and the court having subsequently rendered its opinion in writing in favor of the claimant, Star & Crescent Boat Company, dismissing the libel herein with costs, and the costs of the claimant having been taxed at $69.50;

Now, on motion of Messrs. Gray, Cary, Ames & Driscoll, proctors for the claimant, IT IS ORDERED, ADJUDGED AND DECREED that the libel of Pan American Petroleum Company, a corporation, against the Oil Screw Bergen, her engines, machinery, boilers, boats, tackle, apparel and furniture, etc., be and the same is hereby dismissed, and that the claimant, Star & Crescent Boat Company, recover of the libelant, Pan American Petroleum Company, the sum of $69.50 costs as taxed, and that the same shall bear interest until paid.

IT IS FURTHER ORDERED that unless this decree be satisfied, within ten days after service of a notice of entry thereof on the proctors for the libelant, or unless an appeal be taken therefrom in accordance with the rules and practice of this court, that the stipulators on behalf of the libelant cause the engagement of the respective stipulations to be performed or show cause within five days thereafter why execution should not issue against their goods, chattels and credits to satisfy this decree.

DATED April 30th, 1931.

Paul J. McCormick
United States District Judge.

Approved as to form, as provided in rule 44.

GIBSON, DUNN & CRUTCHER
By Ira C. Powers
Proctors for Libelant.

Decree entered and recorded 4/30/31

R. S. ZIMMERMAN, Clerk
By B. B. Hansen,
Deputy Clerk.

[Endorsed]: In the District Court of the United States, in and for the Southern District of California, Southern Division. No. 21-C-J. In Admiralty. Pan American Petroleum Company, a corporation, libelant, vs. Oil Screw Bergen, her engines, machinery, boilers, boats, tackle, apparel and furniture, etc., respondent. Final Decree. Filed April 30, 1931. R. S. Zimmerman, Clerk, by B. B. Hansen, Deputy Clerk. Gray, Cary, Ames & Driscoll, attorneys at law, Bank of Italy Building, San Diego, California, Proctors for respondent.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA. SOUTHERN DIVISION.

PAN AMERICAN PETROLEUM COMPANY, a corporation, Libelant, vs. OIL SCREW BERGEN, her engines, machinery, boilers, boats, tackle, apparel and furniture, etc., Respondent. STAR AND CRESCENT BOAT COMPANY, Claimant.	No. 21-C-J. In admiralty. STATEMENT OF TESTIMONY.

The above entitled cause came on regularly for trial on the 5th day of February, 1931, before the Honorable Paul J. McCormick, Judge presiding in the above entitled Court. Libelant appeared by Messrs. Gibson, Dunn & Crutcher, its attorneys; and claimant, Star and Crescent Boat Company, appeared by Messrs. Gray, Cary, Ames & Driscoll, its attorneys. The said cause was submitted to the Court upon an agreed stipulation of facts on file herein and in addition thereto the following testimony was introduced pursuant to the provisions of Paragraphs XII, XIII and XIV of the said stipulation of facts:

(Testimony of John E. Heston)

JOHN E. HESTON,

called as a witness on behalf of libelant, testified on

DIRECT EXAMINATION

as follows:

That he was acquainted with Capt. Hall, President of the said claimant, and had had several conversations with reference to the unpaid bills of the Pan American Petroleum Company. That the first conversation was in San Digeo, in the summer or fall of 1928, at Capt. Hall's office, at which time Capt. Hall solicited the said Heston's oil business, and that at that time the said Heston told him that he owed a large sum of money to Pan American Petroleum Company and could not give him the business because that company would enforce collection of their account if he did so. That all the boats which he was operating had accounts with the Pan American Petroleum Company. That the same subject was discussed in a later conversation in the latter part of January, 1929, at which time Capt. Hall requested that a cargo of oil be brought on the S. S. "Bergen" to San Diego. That the said Heston told Capt. Hall of the said Heston's financial condition and that taking the boat away from him at that time would embarrass him; that he had considerable accounts out which were against all his boats, and that the boats would be jumped on by the Pan American Petroleum Company to that extent. Capt. Hall insisted upon a delinquent payment being made or the vessel being returned. That he let Capt. Hall bring the "Bergen" to San Diego sometime in February. That he had a later conversation, in February, 1929, with Capt. Hall, in

(Testimony of John E. Heston)

which he told him again that his action in taking over the "Bergen" might cause all his creditors to take action against all Heston's boats, and that he told Capt. Hall at that time that some of the account of the Pan American Petroleum Company was incurred by the "Bergen".

That thereafter he appealed to Mr. Ralph Chandler, another officer of the Star and Crescent Boat Company, in San Pedro or Wilmington, in the latter part of February. That he told Chandler that if the Star and Crescent Boat Company closed down on him at that time it would probably cause other creditors to bring action and put him out of business. That he told Mr. Chandler at that time that the Pan American Petroleum Company was pestering him for his accounts and that he owed the Pan American Petroleum Company an indebtedness which was incurred by all his boats, including the "Bergen". That Mr. Chandler later told him that their decision to take over the boat was final and that subsequently he received a letter from Mr. Driscoll, attorney for the Star and Crescent Boat Company, asking him to save him the trouble of foreclosure proceedings and requesting the said Heston to give back a bill of sale to the boat, which said Heston told him that he would do if they would release the mortgage. A month or so later a Mr. Wickersham, broker in San Pedro, called the said Heston on the telephone and said that he had been asked to record Heston's bill of sale after the satisfaction of mortgage had been recorded. That the said Heston signed the bill of sale and left it with Mr. Wickersham in escrow until the satisfaction of mortgage was recorded.

(Testimony of John E. Heston)

On

CROSS-EXAMINATION,

the said John E. Heston testified as follows:

That at the time of the transactions involved in this case he was engaged in the fishing business in San Pedro and the "Bergen" was used by him as a tender for the purpose of transporting supplies to his fleet and bringing back the fish. That at that time he had a fleet of small boats which were operating off the coast of Lower California. That at the time of the conversation in the early fall of 1928, in Capt. Hall's office, with regard to the oil business of Heston's boats, Heston told Capt. Hall that he owed quite a sum to the Pan American Petroleum Company. That during the conversation in San Diego in Capt. Hall's office in January, 1929, he told Capt. Hall that he was in financial difficulties and owed bills to various creditors which he was unable to pay, and asked for more time to make the payments on the boat.

Q. Now, did you tell him at that time that there were any liens on the "Bergen" by the Pan American Petroleum Company or anyone else, or that there were accounts due against the "Bergen"?

A. There were accounts due against the "Bergen", yes, that the "Bergen" was responsible for some of my indebtedness.

Q. You said the "Bergen" was responsible for some of your indebtedness?

A. Yes, it would be, if liens were filed.

Q. It would be if liens were filed?

A. Yes.

(Testimony of John E. Heston)

Q. Now, precisely, if you know, what did you say in that conversation, Mr. Heston?

A. Why, I said that there had been no liens filed.

Q. There had been no liens?

A. There had been no liens filed, and the fact that if I had a good spring season this year I could work out of all my difficulties and pay all the bills that I owed.

That at the time of the later conversation in February in San Diego, he told Capt. Hall of the account due against the "Bergen" which is involved in this suit,—that he was pretty clear on that. That by the terms of the bill of sale to the Star and Crescent Boat Company he warranted to defend the vessel against any claims and had in mind the claim of the Pan American Petroleum Company at that time.

Counsel for the claimant thereupon produced a letter, dated April 4, 1929, addressed to John E. Heston from the attorneys for the claimant herein, which was marked, "Claimant's Exhibit A" for identification, and which contained the statement: "We have requested Mr. Chandler, before consummating the transaction, to ascertain whether or not the records show any liens or encumbrances subsequent to the mortgage. In the event that the existence of subsequent liens is indicated, the document should not be recorded until an adjustment is arranged with the lienholders. Mr. Heston testified that he did not remember receiving that letter.

(Testimony of John E. Heston)

On

RE-DIRECT EXAMINATION
MR. HESTON

testified as follows:

That he executed and delivered the bill of sale to Mr. Wickersham, a customs broker, with the understanding that it would not be recorded until after the satisfaction of the mortgage was recorded. That Mr. Wickersham was representing both parties, having received instructions also from Mr. Chandler on behalf of the Star and Crescent Boat Company.

Q. Was anything said at that time about any liens against the boat?

A. The main part of the conversation was getting these documents recorded. As I recollect it, he said, "You have got no bills out", and I said, "Well, there is plenty of bills out, but there has been no liens—but there has been no liens filed against the boat. As far as the boat record is concerned, it is clear yet." Of course, at this time I expected to work out of these difficulties.

Q. When you say "No liens filed", you mean no suits filed?

A. There had been no suits filed, no.

Q. Which did you say?

A. I said there had been no suits filed or liens filed at that time. I thought a lien was a suit.

Q. You thought a lien was a suit?

A. Yes.

(Testimony of Capt. Oakley J. Hall)

CAPT. OAKLEY J. HALL,

called as a witness on behalf of claimant, Star and Crescent Boat Company, testified on

DIRECT EXAMINATION

as follows:

That he is the President of the Star and Crescent Boat Company. That he has known Mr. Heston for about ten or twelve years. That he had heard Mr. Heston's testimony. That he conducted the transaction on behalf of the Star and Crescent Boat Company by which the Oil Screw "Bergen" was sold to Heston during the year 1927. That it was in June or July, 1929, when he first learned that the Pan American Petroleum Company claimed a lien on the "Bergen" for supplies furnished during the fall of 1928. That he could fix the date when he first learned of the claim of the Pan American Petroleum Company by referring to a letter from the Pan American Petroleum Company which was dated July 3, 1929. That prior to that time he had no knowledge of the existence of this claim. That he did recall having several conversations with Mr. Heston, but that he could not recall the exact dates. That at the first conversation in which the matter of his company's furnishing the fuel to Mr. Heston's fleet was discussed, Mr. Heston said that he was deeply in debt to the Pan American Petroleum Company and for that reason he could not give Capt. Hall any business, as they were liable to jump on him for payment of past due accounts. That nothing was said at that time with reference to a claim against the "Bergen" for fuel, oil or supplies. That he did not understand at that time that

(Testimony of Capt. Oakley J. Hall)

the Pan American Petroleum Company had any claim against the "Bergen". That his understanding was that the Pan American Petroleum Company had claims against Mr. Heston for various fuel bills. That he knew that Heston had been operating tenders and fishing boats on the coast for a good many years. That it was his impression that Mr. Heston had been doing most of his business for several years with the Pan American Petroleum Company. That he did not know that there was any account held against the "Bergen". That in the conversation in January, 1929, in San Diego, he asked Mr. Heston to bring some oil to San Diego and suggested that the "Bergen" be put in drydock here, so that his company could do the necessary work on her. That as he recalled, that was about all the conversation. That he did not remember whether anything was said at that time about the payment of Heston's indebtedness. That a little later the vessel was brought down and that he told Heston the company could not let her go on any more trips until the past due payment had been made. That he had several later conversations with Mr. Heston with regard to making the past due payments on the boat, but that he did not remember anything being said about any claim of the Pan American Petroleum Company or others against the "Bergen" in any of these conversations.

That after the "Bergen" was brought down here, Capt. Hall and the Star and Crescent Boat Company looked into the matter of navigating insurance and found that the insurance premiums had not been paid. That he took this up with his attorneys who told him that the insur-

(Testimony of Capt. Oakley J. Hall)

ance premiums would not be a lien against the vessel. That when the claimant accepted back the bill of sale of the "Bergen" and delivered the satisfaction of mortgage, it did not have any knowledge of the existence of the claims against the vessel at all. That Mr. Ralph Chandler, who is another officer of the Star and Crescent Boat Company, handled the matter for the company in San Pedro. That he handled the transaction with Mr. Heston in San Pedro. That Capt. Hall's correspondence and conversations were all with Mr. Chandler personally. That he wrote Mr. Chandler and told him that the quickest way, as he recalled it, to handle the deal would be for the company to take a bill of sale on the vessel, and that he cautioned Chandler not to accept a bill of sale or record the satisfaction of mortgage if there were any liens against the vessel, and cautioned him to make all necessary investigation to find out whether there were any liens against the vessel.

There was thereupon offered and received in evidence, on behalf of claimant and marked, "Claimant's Exhibit B", the letter dated April 4th, 1929, which said letter was addressed to Mr. R. J. Chandler, Wilmington, California, and reads as follows:

"I would like to make it very clear to you, in case we take title to the 'Bergen', without foreclosing our mortgage, if there should be any liens against the vessel in the way of repairs, supplies, or in fact, any liens whatever, we would be liable for them. I would ask that you be reasonably sure that there are no liens before having title to the vessel recorded in your name. If you

(Testimony of Capt. Oakley J. Hall)
think there are any such claims, the best way to do would be to foreclose on the mortgage."
That the said letter was signed by Capt. Hall for the Star and Crescent Boat Company.

The said Capt. Hall further testified that he knew that the claimant had a preferred mortgage against the vessel, but was not sure about the points of law in admiralty as to whether the claim would be a lien on the vessel and take precedence over the mortgage. That the mortgage was not foreclosed for the reason that the company wanted to convert the "Bergen" into a towboat which they needed immediately and did not want to delay for the length of time required for foreclosure. That another reason was that Mr. Heston had told him that it would reflect on his credit and make it embarrassing for him if the mortgage was foreclosed, and that he believed that was one of the principal reasons why they took back the bill of sale, instead of foreclosing the mortgage. That he knew all the time that if they let the thing go through the regular channels and had foreclosed the mortgage and bid the vessel in, that there wouldn't be any liability for any claim coming back on them. That at the time the suit was filed the "Bergen" was being converted.

On

CROSS-EXAMINATION
CAPT. HALL

testified that his attention was first called to the conversations which he had had with Mr. Heston about two weeks prior to the trial. That he was not very clear as to just what was said in any particular conversation, except that

(Testimony of Capt. Oakley J. Hall)

Mr. Heston's testimony here refreshed his memory on several of the conversations that he had. That he did not know whether Heston's indebtedness that he spoke to him about in the fall of 1928 was confined to any particular boats or not. That he happened to make the investigation with regard to insurance at the time the 'Bergen' was chartered to Van Camp Sea Food Co. for a trip down the coast. That his company naturally wanted to see that the vessel was covered with insurance, and that he took it up with his insurance brokers to see what insurance he could get on the trip. They had considerable correspondence or conversation about it, and his insurance brokers told him that the premiums on the insurance that Mr. Heston had on the vessel previous to this time had not been paid. That this was the only investigation that he personally made to determine whether any bills had been paid by Mr. Heston. That he requested Mr. Chandler in San Pedro to make investigations there to see if there were any bills. That it was thereupon stipulated that Mr. Wickersham act as a broker in connection with the delivery of the bill of sale and the satisfaction of the mortgage, having been designated either by Mr. Heston or by Mr. Chandler in Los Angeles to receive the bill of sale from Heston and hold it until such time as the satisfaction of mortgage was recorded.

STIPULATION

IT IS HEREBY STIPULATED by and between the parties hereto that the foregoing statement of testimony is true and correct and constitutes all of the evidence offered and received at the trial of the said action, and that the same may be made a part of the record on appeal in the above entitled cause.

DATED: April 11th, 1932.

GIBSON, DUNN & CRUTCHER,
By Ira C Powers
Proctors for Libelant.

GRAY, CARY, AMES & DRISCOLL,
By J. G. Driscoll Jr.
Proctors for Claimant.

I hereby certify the within and foregoing to be a true and correct statement of the testimony taken at the trial of the above entitled action. The same is accordingly allowed and settled and ordered filed as a part of the record in this cause.

DATED: April 20th, 1932.

Paul J. McCormick
Judge of the United States District Court.

[Endorsed]: No. 21-C-J In Admiralty. District Court of the United States In and for the Southern District of California Southern Division Pan American Petroleum Company, a corporation, Plaintiff vs. Oil Screw "Bergen", etc., Respondent, Star and Crescent Boat Company, Claimant. Statement of Testimony Filed Apr 20 1932 R. S. Zimmerman, Clerk By Theodore Hocke Deputy Clerk Gibson, Dunn & Crutcher 634 South Spring Street MUtual 5381 Los Angeles, Cal. Attorneys for Plaintiff.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

PAN AMERICAN PETROLEUM COMPANY, a corporation, Libelant, vs. OIL SCREW BERGEN, her engine, machinery, boilers, boats, tackle, apparel and furniture, etc., Respondent.	No. 21-C-J In Admiralty NOTICE OF APPEAL

To R. S. Zimmerman, Clerk of the above entitled Court, and to Gray, Cary, Ames & Driscoll, Proctors for claimant Star & Crescent Boat Co., Bank of Italy Building, San Diego, California.

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE, that Pan American Petroleum Company, a corporation, the libelant in the above entitled cause, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree entered herein on the 30th day of April, 1931, and from each and every part of said decree.

DATED: This 22d day of July, 1931.

GIBSON, DUNN & CRUTCHER,
Proctors for libelant,
634 South Spring St.,
Los Angeles, California,
By Robert F. Schwarz

[Endorsed]: Original No. 21-C-J In Admiralty In the District Court of the United States for the Southern

District of California, Southern Division Pan American Petroleum Company, a corporation, Libelant, vs. Oil Screw Bergen, her engine, machinery, boilers, boats, tackle, apparel and furniture, etc., Respondent. Notice of Appeal Received Copy of within Notice of Appeal this 23rd day of July, 1931 Gray, Cary, Ames & Driscoll By J. G. Driscoll, Jr Proctors for Claimant, Star & Crescent Boat Company. Filed Jul 27 1931 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk Gibson, Dunn & Crutcher 634 So. Spring St. Los Angeles, Cal. Proctors for Libelant.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

PAN AMERICAN PETROLEUM COMPANY, a corporation, Libelant, vs. OIL SCREW BERGEN, her engine, machinery, boilers, boats, tackle, apparel and furniture, etc., Respondent.	No. 21-C-J AFFIDAVIT OF SERVICE OF NOTICE OF APPEAL.

STATE OF CALIFORNIA,)
: ss.
COUNTY OF SAN DIEGO.)

CHARLES FOX, being duly sworn, deposes and says: That he is and was at the time of service of the Notice

of Appeal herein referred to a citizen of the United States over the age of eighteen (18) years and not a party to the above entitled action; that he served said Notice of Appeal upon Gray, Cary, Ames & Driscoll, Proctors for Claimant, Star & Crescent Boat Co., by leaving a copy thereof with J. G. Driscoll, Jr., a member of said firm of proctors, at his office in the Bank of America Building, San Diego, California, on July 23, 1931.

Charles Fox

SUBSCRIBED AND SWORN to before me this 23rd day of July, 1931.

[Seal] Marian B. D'Ave

Notary Public in and for said County and State.

[Endorsed]: Original No. 21-C-J District Court of the United States In and for the Southern District of California Southern Division Pan American Petroleum Company, a corporation, Libelant vs. Oil Screw Bergen, her engine, machinery, boilers, etc. Respondent. Affidavit of Service of Notice of *Trial* Filed Jul 27 1931 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk. Gibson, Dunn & Crutcher 634 South Spring Street, Los Angeles, Cal. Attorneys for Libelant.

IN THE SOUTHERN DIVISION OF THE UNITED STATES DISTRICT COURT, FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

IN ADMIRALTY.

PAN AMERICAN PETROLEUM COMPANY, a corporation, Libelant, vs. OIL SCREW "BERGEN", her engines, machinery, boilers, boats, tackle, apparel and furniture, etc., Respondent.	No. 21-C-J ASSIGNMENTS OF ERROR

Comes now the libelant, Pan American Petroleum Company, a corporation, the appellant herein, and makes the following assignments of error upon which it will rely in the prosecution of the appeal herein:

I.

The Court erred in making that portion of Finding No. II, reading as follows:

"That it is not true that during said negotiations said claimant was advised by the said John E. Heston of the approximate amount and character of the claim of the libelant herein, or what specific materials and supplies were furnished to the respondent vessel."

II.

The Court erred in making that portion of Finding No. II reading as follows:

"Nor is it true that the claimant was advised that the said Heston anticipated that libelant would take action against respondent vessel."

III.

The Court erred in failing and refusing to make, as requested by libelant, the following finding of fact:

"That during the course of said conversations, said claimant was advised by the said John E. Heston of the fact that libelant herein had furnished material and supplies, consisting of gasoline, fuel oil and petroleum products, for the use of respondent vessel, that a substantial portion of the purchase "price of said materials so furnished and used by said respondent vessel had not been paid and that the said Heston anticipated that libelant would take action against respondent vessel, but that no action had at that time been instituted."

IV.

The Court erred in failing to find upon the issues of fact arising upon the trial of said action pursuant to paragraphs XII and XIII of the stipulation of facts herein, in omitting to find whether claimant was advised by the said John E. Heston during the times referred to in said paragraph XII of the approximate amount and character of the claim of libelant herein, or what materials and supplies were furnished to the respondent vessel, or that libelant had not at that time instituted any action.

V.

The evidence received upon the trial of the above cause was and is wholly insufficient to justify the findings of the trial court.

VI.

The evidence received upon the trial of the above cause was and is wholly insufficient to justify that portion of Finding No. I of the trial court reading as follows:

"That it is not true that during said negotiations said claimant was advised by the said John E. Heston of the approximate amount and character of the claim of the libelant herein."

VII.

That the evidence received upon the trial of the above cause was and is wholly insufficient to justify Finding No. II of the trial court that it is not true that during the negotiations referred to therein claimant was advised by said John E. Heston as to what specific materials and supplies were furnished to respondent vessel.

VIII.

The evidence received upon the trial of the above cause was and is wholly insufficient to justify that portion of Finding No. II of the trial court reading as follows:

"Nor is it true that the claimant was advised that the said Heston anticipated that the libelant would take action against respondent vessel."

IX.

The Court erred in its conclusions of law in finding that libelant acquired no lien against the respondent vessel, her engines, machinery, boilers, boats, tackle, apparel and furniture, etc., for the reason that evidence received upon the trial was and is wholly insufficient to justify said finding, but said evidence conclusively shows that libelant did acquire a lien against respondent vessel, her engines, machinery, boilers, boats, tackle, apparel and furniture, etc.

X.

The Court erred in its conclusions of law in finding that claimant Star & Crescent Boat Company was entitled to a decree herein dismissing said libel, with the costs of claimant.

XI.

The Court erred in giving, making, rendering and filing its decree in the above entitled action in favor of claimant and against libelant, for the reason that said decree is not supported by the findings of the Court or by stipulation of facts upon which the cause was tried.

XII.

The Court erred in giving, making, rendering and filing its decree in the above entitled action in favor of claimant and against the libelant, for the reason that said decree was and is contrary to law and to the case made and facts stated in the pleadings and in the records in said action, including the agreed stipulation of facts on which the said cause was tried.

WHEREFORE, libelant and appellant prays that the decree rendered against the said libelant and appellant be corrected and that speedy justice be done to the parties in that behalf.

H. F. PRINCE
IRA C. POWERS
GIBSON, DUNN & CRUTCHER,
By Ira C. Powers
Proctors for Libelant and Appellant.

Certificate of Counsel.

We, the undersigned attorneys, certify that the foregoing assignments of error is made on behalf of the libelant and appellant Pan American Petroleum Company, a corporation, and is, in our opinion, well taken, and the same now constitutes the assignments of error relied upon in the prosecution of the appeal herein.

H. F. PRINCE
IRA C. POWERS
GIBSON, DUNN & CRUTCHER,
By Ira C. Powers
Proctors for Libelant and Appellant.

[Endorsed]: Original In Admiralty. No. 21-C-J District Court of the United States In and for the Southern District of California Southern Division Pan American Petroleum Company, a corporation, Libelant, vs. Oil Screw "Bergen", etc., Respondent. Assignments of Error Filed Apr 26 1932 R. S. Zimmerman, Clerk By C. A. Simmons, Deputy Clerk Gibson, Dunn & Crutcher 634 South Spring Street MUtual 5381 Los Angeles, Cal. Proctors for Libelant and Appellant

COLUMBIA CASUALTY COMPANY Bond
No. 15684

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

PAN AMERICAN PETROLEUM COMPANY, a corporation, Libelant,	21-C-J
-vs-	UNDERTAKING FOR COSTS ON APPEAL
OIL SCREW BERGEN, her engine, machinery, boilers, boats, tackle, apparel and furniture, etc., Respondent.	(Pursuant to the rules and practice of this Court)

WHEREAS, the libelant in the above-entitled action has appealed to the United States Circuit Court of the Ninth Circuit, from a judgment made and entered against said libelant in said action in the United States District Court of the United States, for the Southern District of California, Southern Division, in favor of the respondent in said action on the 30th day of April, A. D. 1931, dismissing the libel herein.

NOW, THEREFORE, in consideration of the premises, and of such appeal, the COLUMBIA CASUALTY COMPANY, a corporation organized and existing under and by virtue of the laws of New York, and authorized to transact its business of suretyship in the State of

California, as Surety, does hereby undertake and promise, on the part of the libelant, that the said libelant shall prosecute its appeal to effect and pay all the costs if the appeal is not sustained, not exceeding Two Hundred Fifty and no/100 ($250.00) to which amount it acknowledges itself bound.

IN WITNESS WHEREOF, the said COLUMBIA CASUALTY COMPANY has caused this obligation to be signed by its duly authorized Attorney-in-Fact at Los Angeles, California and its corporate seal to be hereto affixed, this 5th day of August, A. D. 1931.

COLUMBIA CASUALTY COMPANY
By R. L. TRAVISS
[Seal] R. L. TRAVISS-Attorney-in-Fact

STATE OF CALIFORNIA)
) ss
County of Los Angeles)

On this 5th day of August A. D. 1931, before me, C. B. Fisher, a Notary Public in and for the County of Los Angeles personally appeared R. L. Traviss, Attorney-in-fact of the COLUMBIA CASUALTY COMPANY, to me personally known to be the individual described in and who executed the within instrument, and he acknowledged the execution of the same, and being by me duly sworn, deposeth and saith, that he is the said Attorney-in-fact of the Company aforesaid, and that the seal affixed

to the within instrument is the corporate seal of the said Company, and that the said corporate seal and his signature as such Attorney-in-fact were duly affixed and subscribed to the said instrument by the authority and direction of the said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in the city of Los Angeles, State of California the day and year first above written.

C. B. Fisher

[Seal] Notary Public in and for said County of Los Angeles, State of California. My Commission Expires Jan. 4, 1934

[Endorsed]: 21-J Columbia Casualty Company Home Office One Park Avenue, New York, N. Y. Charles H. Neely President Bond No. 15684 Issued to Pan American Petroleum Company, a corporation, Libelant vs. Oil Screw Bergen, her engine, machinery, boilers, boats, tackle, apparel and furniture, etc., Respondent Filed Aug. 5, 1931 R. S. Zimmerman, clerk by Edmund L. Smith, deputy clerk.

PRAECIPE

UNITED STATES OF AMERICA
DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF CALIFORNIA

PAN AMERICAN PETROLEUM COMPANY, a corporation, Libelant -vs- OIL SCREW "BERGEN", her engine, machinery, boilers, boats, tackle, apparel and furniture, etc., Respondent.	Clerk's Office. No. 21-C-J In Admiralty. Amended Praecipe

To the Clerk of Said Court:

Sir:

Please issue under the hand and seal of the Court, a certified transcript of record in the above entitled cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, on the appeal in said cause, including therein:

(1) Libel for material and supplies.

(2) Claim of Star & Crescent Boat Company.

(3) Answer to libel (omitting interrogatories attached thereto).

(4) Stipulation of facts.

(5) Monition.

(6) Minute order dismissing libel.

(7) Libelant's request for findings.

(8) Findings of fact and conclusions of law.

(9) Decree.

(10) Opinion of Hon. Paul J. McCormick, Judge.

(11) Statement of testimony.

(12) Orders extending time for docketing record on appeal.

(13) Assignments of error.

(14) Stipulation for costs.

(15) Certificate of the Clerk.

H. F. PRINCE
IRA C. POWERS
GIBSON, DUNN & CRUTCHER,
By Ira C. Powers
Proctors for Libelant and Appellant.

[Endorsed]: May 25, 1932. Receipt of copy of the within amended praecipe is hereby acknowledged. Gray, Cary, Ames & Driscoll, by J. G. Driscoll, Jr., Attorneys for Respondent. Original No. 21-C-J U. S. District Court Southern District of California Pan American Petroleum Company, etc., Libelant, vs. Oil Screw "Bergen", etc., Respondent. Amended Praecipe for Numerous Documents. Filed May 28, 1932 R. S. Zimmerman, clerk by Theodore Hocke, deputy clerk Gibson, Dunn & Crutcher 1111 Merchants National Bank Building N. E. Cor. Sixth & Spring Sts. Los Angeles, Cal. MUtual 5381

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

PAN AMERICAN PETROLEUM COMPANY, a corporation, Libelant,	)	
vs.	)	No. 21-C-J
	)	In Admiralty
OIL SCREW BERGEN, her engine, machinery, boilers, boats, tackle, apparel and furniture, etc., Respondent.	)	

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 83 pages, numbered from 1 to 83 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the libel; monition; claim of Star & Crescent Boat Company; libelant's stipulation for costs; answer to libel with the interrogatories attached thereto omitted; stipulation of facts; request for findings; minute order dismissing libel; memorandum opinion; findings of fact and conclusions of law; final decree; statement of testimony; notice of appeal; assignments of error; bond on appeal and praecipe.

I DO FURTHER CERTIFY that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to ..... and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this..... day of ..... in the year of Our Lord One Thousand Nine Hundred and Thirty-two, and of our Independence the One Hundred and Fifty-sixth.

R. S. ZIMMERMAN,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By

Deputy.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Pan American Petroleum Company, a corporation,

Libelant and Appellant,

vs.

Oil Screw Bergen, her engines, machinery, boilers, boats, tackle, apparel and furniture, etc.,

Respondent,

Star and Crescent Boat Company,

Claimant and Appellee.

BRIEF FOR APPELLANT.

H. F. PRINCE,

GIBSON, DUNN & CRUTCHER,

634 South Spring St., Los Angeles, California,

Proctors for Libelant and Appellant.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

TOPICAL INDEX.

TABLE OF CASES AND AUTHORITIES CITED.

No. .....

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Pan American Petroleum Company, a corporation,
Libelant and Appellant,

vs.

Oil Screw Bergen, her engines, machinery, boilers, boats, tackle, apparel and furniture, etc.,
Respondent,

Star and Crescent Boat Company,
Claimant and Appellee.

BRIEF FOR APPELLANT.

This is an appeal from the District Court of the United States, for the Southern District of California, Southern Division, after trial in admiralty before Honorable Paul J. McCormick, District Judge. The opinion of the court appears at page 51 of the record and is printed in Volume 50, Federal Reporter, 2nd Series, page 447.

The Pan American Petroleum Company was libelant in the court below and the Star & Crescent Boat Company was the claimant, and for convenience they will be so designated herein.

STATEMENT OF CASE.

Nature of the Action.

This was a libel *in rem* [R. p. 2] brought by libelant against the Oil Screw "Bergen" for the recovery of the value of fuel oil and supplies furnished by libelant to the said vessel at the request of John E. Heston, who was then the managing owner and agent of said vessel.

Defenses in the Answer.

The answer of the claimant [R. p. 14] denied the allegations of the libel for lack of information and belief and sets up as special defenses the allegation [R. p. 15] that said John E. Heston, by the terms of a preferred mortgage executed by him covering the said vessel, was unauthorized to grant, incur or permit any lien for supplies or materials on said vessel. It was further alleged [R. p. 19] that the supplies furnished to the "Bergen" were furnished to it as a carrier or tender and not for its use, but for the use of other vessels.

Statement of Essential Facts.

The case was tried upon a stipulation of facts [R. p. 76] and upon oral testimony, as provided by paragraphs XII and XIII of said stipulation of facts [R. p. 45] on the issue of notice to claimant of the fact that libelant had furnished supplies to the vessel. This stipulation of facts, briefly, provided that libelant had furnished and supplied to the vessel fuel oil and gasoline and other fuel supplies of the total value of $2,062.31 upon written order signed by John E. Heston, who was then the owner and managing agent of the vessel. A typical purchase order is

set out at page 37 of the record and contains the notations, "Deliver to M. S. Bergen" and "Charge to M. S. Bergen"; signed "John E. Heston". It was stipulated [R. p. 39] that all of the said materials and supplies were delivered to respondent vessel in the harbor of San Pedro and that a delivery ticket accompanied each delivery and was signed in each case either by the captain or by the chief engineer of the respondent vessel.

A typical invoice covering supplies so delivered is set up at page 39 of the record, containing the notation "sold to the boat 'Bergen' and owners, John E. Heston Account #1".

It was further stipulated [R. p. 40] that of the materials and supplies so delivered to respondent vessel, there was actually used by said vessel gasoline, deisel fuel and lubricating oil of the reasonable and agreed value of $1287.61, and that no part of said sum had been paid to libelant and the whole thereof, together with interest thereon at 7% per annum from October 26, 1928, remains due and owing.

It was stipulated [R. p. 41] that prior to the time when the said supplies were furnished to the said vessel, the claimant sold the said vessel to said John E. Heston and as a part of the consideration therefor said John E. Heston executed his promissory note in the principal amount of $40,000, secured by a preferred mortgage, dated September 30, 1927, and that all things required to be done by the Merchants' Marine Act of June 5, 1920, in order to give the mortgage the status of a preferred mortgage were duly performed.

It was stipulated [R. p. 43] that a copy of the mortgage was retained on board the respondent vessel by the

mortgagor who had, upon request of any person having business with the vessel, exhibited its documents. It was also stipulated that "libelant did not at any time mentioned in the stipulation of the facts have any actual knowledge of the execution or delivery of said preferred mortgage or of the existence of the same". [R. pp. 43-44.] It was stipulated [R. p. 44] that during February, 1929, claimant requested Mr. Heston, who for three months had been in default in payments under the terms of the mortgage, to execute and deliver to claimant a bill of sale of the respondent vessel and to deliver possession of the said vessel to claimant; that after some negotiations it was agreed that Heston would execute and deliver the bill of sale provided claimant would accept the same in full payment of the indebtedness of the said Heston and would cause the mortgage to be fully satisfied, cancelled and discharged and deliver up to said Heston his said note in the sum of $40,000; and this arrangement was consummated on or about the 1st day of May, 1929.

The foregoing facts appear without contradiction from the stipulation of facts on which the case was submitted. The oral testimony introduced at the trial relative to the question of notice to claimant of the existence of claimant's lien against the respondent vessel, presents some contradictory features. Heston's testimony was quite clear that he had repeatedly told Captain Hall, an officer of the claimant, of the libelant's account against the respondent vessel [R. pp. 60-64] and that he had made similar statements to a Mr. Chandler, another officer of the claimant company. Captain Hall's testimony contradicted that of Mr. Heston to some extent, although for the most part it is entirely uncontradicted.

The Findings.

Libelant requested the court to make a finding that during the course of conversations had between John E. Heston and the claimant, prior to the execution and delivery of the bill of sale from Heston to claimant,

> "said claimant was advised by the said John E. Heston of the fact that libelant herein had furnished materials and supplies, consisting of gasoline, fuel oil and petroleum products, for use of the respondent vessel, that a substantial portion of the purchase price of said materials so furnished and used by said respondent vessel had not been paid, and that the said Heston anticipated that libelant would take action against respondent vessel, but that no action had at that time been instituted." [R. pp. 48-49.]

The foregoing request for findings was denied, except as incorporated in findings as made by the court, which appear at page 55 of the record, where the court finds merely that

> "It is not true that during said negotiations said claimant was advised by the said John E. Heston of the approximate amount and character of the claim of the libelant herein, or what *specific* materials and supplies were furnished to respondent vessel; nor is it true that claimant was advised that said Heston anticipated that libelant would take action against respondent vessel."

It will be noted that there was no contention on the part of libelant that claimant had been advised as to "what specific materials and supplies" were furnished.

ASSIGNMENTS OF ERROR RELIED UPON.

Libelant relies upon the following assignments of error:

(a) Assignments 1, 2, 5, 6, 7 and 8 [R. pp. 74-76]: The court erred in finding that claimant was not advised by Mr. Heston of the existence of libelant's claim and that Mr. Heston anticipated libelant would take action against the libelant vessel.

(b) Assignments 3 and 5 [R. p. 75]: The court erred in failing and refusing to make, as requested by libelant, a finding that claimant was advised by Mr. Heston of the fact that libelant had furnished fuel supplies and materials for the use of the respondent vessel and that a substantial portion of this indebtedness remained unpaid, and that Mr. Heston anticipated that libelant would take action against the respondent vessel.

(c) Assignments 4 and 7 [R. pp. 75-76]: The court erred in failing to find upon the issues of fact arising on the trial of said action pursuant to paragraphs 12 and 13 of the stipulation of facts, and in omitting to find whether claimant was advised by Mr. Heston during the times referred to in said paragraph 12 of the approximate amount and character of the claim of libelant herein, or what materials and supplies were furnished to respondent vessel, or that libelant had not at that time instituted any action.

(d) Assignment 7 [R. p. 76]: The evidence is wholly insufficient to justify the finding of the trial court that it is not true that during the negotiations referred to therein claimant was advised by Mr. Heston as to what specific materials and supplies were furnished to respondent vessel.

(e) Assignment 9 [R. p. 76]: The court erred in its conclusions of law in finding that libelant acquired no lien against the respondent vessel.

Grounds of the Decision Below.

It is apparent from the opinion of the District Court that the decision of the court was reached solely on the question of the effect of the clause in the claimant's mortgage by which the mortgagor was forbidden to incur any liens against the vessel, with certain defined exceptions, and this was the point mainly relied upon by the claimant at the trial. The question of the effect of the cancellation of the mortgage with knowledge of the outstanding claim of the libelant, is not passed upon by the trial judge.

BRIEF OF THE ARGUMENT.

I.

It conclusively appears from the record on appeal that claimant was, several months prior to the transaction by which it received bill of sale from Mr. Heston, the mortgagor, to respondent vessel and cancelled and surrendered the mortgage thereon, fully advised of the existence of respondent's claim, and if it did not have actual notice thereof was charged with constructive notice. [R. pp. 60-69.]

The Tompkins, 13 Fed. (2) 552, 554 (C. C. A. 2);

Mellon v. St. Louis Union Trust Co., 225 Fed. 693, 703 (C. C. A. 8);

Coder v. McPherson, 152 Fed. 951, 953 (C. C. A. 8);

2 *Pomeroy Equity Jurisprudence,* Sec. 597;

20 *R. C. L.,* p. 346, Sec. 7.

II.

Where a mortgagee, with knowledge of an outstanding junior lien, intentionally cancels his mortgage and accepts a conveyance from the mortgagor of the mortgaged property, the prior mortgage is merged in the conveyance and no longer takes priority over the junior lien, and this is true even though the conveyance was taken under a misapprehension as to the status of the outstanding lien or claim.

Gainey v. Anderson (Ga.), 68 S. E. 888, 890;

Bailey v. Eakes (Ark.), 271 S. W. 978, 979;

Woodside v. Lippold (Ga.), 39 S. E. 400, 401-402; 84 Am. St. Rep. 267;

Beacham v. Gurney (Ia.), 60 N. W. 187, 188;

Errett v. Wheeler (Minn.), 123 N. W. 414, 416, 417;

Benenson v. Evans (Ga.), 134 S. E. 441, 444;

Frazee v. Inslee, 2 N. J. Eq. 239, 242;

Emmons v. Crooks, 1 Grant's Chancery 159, 167-168;

Toulmin v. Steere, 36 Eng. Rep. 81; 3 Merivale 211.

III.

The mere fact that by the provisions of respondent's mortgage the owner agreed not to suffer or permit any lien to be incurred against the vessel, did not prevent libelant from obtaining a lien against the vessel subsequent to the lien of respondent.

Morse Drydock & Repair Co., Petitioner, v. S. S. "Northern Star", et al., 271 U. S. 552; 70 L. ed. 1082, 1083;

Same case, 7 Fed. (2d) 505 (C. C. A. 2);

3 *Pomeroy Equity Jurisprudence*, Secs. 1193, 1194, p. 2826, Note 1.

ARGUMENT.

I.

It Conclusively Appears From the Record on Appeal That Claimant Was, Several Months Prior to the Transaction by Which It Received Bill of Sale From Mr. Heston, the Mortgagor, to Respondent Vessel and Cancelled and Surrendered the Mortgage Thereon, Fully Advised of the Existence of Respondent's Claim, and if It Did Not Have Actual Notice Thereof Was Charged With Constructive Notice. [R. pp. 60-69.]

Mr. Heston's testimony [R. pp. 62-64] was that in the summer or fall of 1928 Captain Hall, an officer of the claimant, solicited Heston's oil business and was told by Heston at that time that he was indebted to Pan American in a large amount, and for that reason could not give him the business, and that all his boats had accounts with the libelant; that the matter was again discussed in January, 1929, at which time Captain Hall requested that a cargo of oil be brought on board the respondent vessel to San Diego, at which time Heston told him that there were large accounts out against all his boats and that they would be jumped on by the libelant; that in a later conversation in February, 1929, he told Captain Hall that some of the Pan American indebtedness was incurred by the "Bergen"; that in the latter part of February he told Ralph Chandler, another officer of the claimant, that he was largely indebted to libelant and that this indebtedness was incurred by all his boats, including the respondent vessel. He repeated this testimony in more detail on cross-examination. [R. pp. 62-63.] He further stated that he told Captain Hall in January 1929, that the "Bergen" was responsible for some of his indebtedness and that he told him of the account against the "Bergen"

which is involved in the present suit. He further testified that at the time of the recording of the satisfaction of mortgage he told the broker, Mr. Wickersham, who was representing both parties, that there were plenty of bills out against the boat, but that no liens had been filed yet, meaning that no suits had been filed. [R. p. 64.]

Captain Hall, called on behalf of the claimant, did not directly deny Mr. Heston's testimony. He did not recall the dates of the conversations but remembered that in the conversation with regard to his company's furnishing Heston fuel, Heston had said that he was deeply indebted to libelant and for that reason could not give claimant his business. He did not remember anything being said about any claim of the libelant against the "Bergen". [R. p. 66.] He stated that Mr. Ralph Chandler, an officer of the claimant, had handled the matter for the claimant in San Pedro in connection with the satisfaction of the mortgage. [R. p. 67.] He also testified that his attention was first called to the various conversations which he had had with Mr. Heston about two weeks prior to the trial (which occurred in February, 1931); that he was not clear as to just what was said in any particular conversation and that he did not know whether Heston's indebtedness that he spoke to him about in the fall of 1928 was confined to any particular boats or not. [R. p. 69.] Neither Mr. Chandler nor Mr. Wickersham testified at the trial, so that Mr. Heston's testimony with reference to his statements to them was entirely uncontradicted.

From the foregoing it appears that claimant, according to the testimony of its own witness, was fully advised of the existence of the indebtedness of Heston to libelant and that on the witness' own admission this indebtedness was not regarded as confined to boats other than the

"Bergen". In view of the haziness of Captain Hall's testimony and his failure to deny the direct and unequivocal testimony of Mr. Heston as to the various conversations, as well as claimant's failure to call Mr. Chandler or Mr. Wickersham, the conclusion is irresistible that claimant did, prior to the time it took back its bill of sale from Heston and discharged the mortgage, have actual knowledge of the existence of a claim on the part of libelant for fuel supplies furnished to respondent vessel.

The evasive nature of the trial court's findings is a recognition of this fact, and explains the insertion of the word "specific" in finding II, before the words "materials and supplies". Of course, it is immaterial whether the claimant had knowledge of the *"specific"* materials and supplies furnished, so long as claimant was *advised that supplies and materials were furnished.*

> "If a person has knowledge of such facts as would lead a fair and prudent man, using ordinary thoughtfulness and care to make further accessible inquiries, and he avoids the inquiry, he is chargeable with the knowledge which by ordinary diligence he would have acquired. Knowledge of facts, which, to the mind of a man of ordinary prudence, beget inquiry, is actual notice, or, in other words, is the knowledge which a reasonable investigation would have revealed."

The Tompkins, 13 Fed. (2) 552, 554.

Mellon v. St. Louis Union Trust Co., 225 Fed. 693, 703 (C. C. A. 8);

Coder v. McPherson, 152 Fed. 951, 953 (C. C. A. 8);

2 *Pomeroy Equity Jurisprudence,* Sec. 597;

20 *R. C. L.*, p. 346, Sec. 7.

Admittedly, the claimant had actual knowledge of Heston's indebtedness to Pan American and that this indebtedness arose from the sale of petroleum supplies used on his various vessels, including the respondent vessel. Nothing further was required to charge the claimant with knowledge of the indebtedness involved in the present suit and the lien which arose therefrom. We do not believe that claimant's counsel will make any contention to the effect that any further knowledge as to the amount, character or nature of the materials or what specific materials were furnished was required or that such information could not have been ascertained upon the slightest inquiry.

II.

Where a Mortgagee, With Knowledge of an Outstanding Junior Lien, Intentionally Cancels His Mortgage and Accepts a Conveyance From the Mortgagor of the Mortgaged Property, the Prior Mortgage Is Merged in the Conveyance and No Longer Takes Priority Over the Junior Lien, and This Is True Even Though the Conveyance Was Taken Under a Misapprehension as to the Status of the Outstanding Lien or Claim.

The foregoing principle is well established, both in this country and in England.

Gainey v. Anderson (Ga.), 68 S. E. 888, 890,

was an action by Mrs. Gainey to recover her dower interest in certain land which had been mortgaged by her husband to defendant's assignors. A judgment for the plaintiff was affirmed. The evidence showed that the plaintiff, at the time of the execution of the mortgage, had renounced

her dower in the land, but upon a subsequent conveyance of the land to the mortgagee in satisfaction of the mortgage she did not renounce dower. It was the plaintiff's contention that the merger of the two estates in the mortgagee restored plaintiff's inchoate right of dower. The defense was based upon the contention that it being in the interests of the mortgagees to preserve the lien of their mortgage to protect the legal title against plaintiff's claim of dower, a merger would not take place. The court said, in answer to the contention of defendants and appellants:

> "It does not even appear that the bond and mortgage were retained by the mortgagees. They were put in evidence, but the record fails to show by whom they were introduced, or from whose possession they came. The fact that Mrs. Gainey was asked to sign the deed with her husband tends to support the theory of merger, because *it tends to show that the mortgagees thought that her signature to the deed was sufficient to convey all her interest in the land, including her inchoate right of dower. If they so thought, there would have been no reason to want to keep the mortgage alive.* If she had regularly renounced her dower on the deed, no reason could have been assigned for an intention on the part of the mortgagees to keep the mortgage open. Moreover, it does not appear that Carrigan's interest in the land was conveyed subject to the mortgage, or that the conveyance was accompanied by an assignment of his interest in the mortgage, either of which would have been some evidence of intention to keep the mortgage alive, and the absence of which, of course, tends to prove the contrary. As there is no direct or circumstantial evidence of such intention, the only thing upon which a finding of its existence can be predicated is the presumption which arises from the fact that it would

have been to the interest of the mortgagees, which is overthrown by the facts and circumstances above mentioned.' (Italics ours.)

Gainey v. Anderson, 68 S. E. 888, 890.

Bailey v. Eakes (Ark.), 271 S. W. 978, 979,

was an appeal by the plaintiff from a decree dismissing his amended bill for failure to state a cause of action against the defendants. The suit was originally brought to foreclose a mortgage, naming the mortgagors as defendants, together with the defendant Eakes, who was made a party by reason of possessing a leasehold interest in the property. During the pendency of the action the mortgagors conveyed the property to plaintiff, and plaintiff accepted the deed with knowledge of the existence of Eakes' leasehold interest. After acceptance of the deed from the mortgagors, the action was dismissed as to the mortgagors and an amended bill was filed against Eakes, the lessee. It was appellant's contention on appeal that after execution and recordation of the mortgage the mortgagors had no right to execute a lease or create a tenancy which would affect the interest of the mortgagee and prevent his foreclosing on the property. In answer to this contention the court said:

"This contention is made upon the erroneous assumption that appellant was a mortgagee after he accepted deeds to the lands from the Martins and Wards. After the execution and acceptance of the deeds, appellant's rights as a mortgagee merged into his estate as owner in fee of the lands, *subject, of course, to other intervening incumbrances of which he had knowledge.* One of the intervening incumbrances was the lease executed by Martin to Dow

Eakes for the year 1924 for $350 cash in advance. Appellant's amended bill contains the following admission:

'It is admitted that before the proceedings to foreclose said mortgage were instituted, the defendant Dow Eakes leased said premises from W. J. Martin for the year 1924, and paid him $350 cash, all of which was known to appellant at the time he accepted the deed in the settlement of his demand.'

"In accepting the deed with knowledge of the tenancy, appellant ceased to be a mortgagee and assumed the relationship of landlord to Dow Eakes and wife. He voluntarily stepped into the shoes of Martin, and his right is no greater than Martin's right." (Italics ours.)

Bailey v. Eakes, 271 S. W. 978, 979.

Woodside v. Lippold (Ga.), 39 S. E. 400, 401-402; 84 Am. St. Rep. 267,

was an action to establish the priority of plaintiff's mortgages, to have their cancellation declared of no effect, and for foreclosure. It appeared that the mortgagee and his grantee had made an entry of satisfaction upon the mortgage and had the same cancelled of record at a time when both the mortgagee and his grantee, the banking company, had actual notice of a subsequent mortgage but were acting under a misapprehension that the holder of the subsequent mortgage would not insist upon its enforcement. There was evidence that the mortgagee and his grantee would not have cancelled the mortgages but for the fact that they believed there would be no effort to set up the subsequent mortgage. Upon the subsequent mortgagor filing a petition to foreclose his mortgage the present

action was filed. Judgment entered upon a verdict for defendants was affirmed, the court saying:

> "This case turns upon the question whether, under the facts stated, equity will restore the liens of the mortgages canceled by the American Trust & Banking Company to their original priority over the mortgage held by Lippold. Under the view we take of the matter, it is unnecessary to determine whether, according to the equitable doctrine relating to merger, the liens of the mortgages held by the banking company were merged in the title when Mrs. Venable conveyed the premises to the company, or were extinguished by the settlement of the mortgage debt in that transaction; for, in our opinion, there can be no doubt that the liens of such mortgages were absolutely extinguished when, at the request of Woodside, who had purchased the mortgaged property from the banking company, and taken a warranty deed thereto, the banking company made the entries of full satisfaction upon such mortgages, and had them canceled of record; this being done in order to clear the record of liens against the property. If, up to the date of Woodside's purchase, there had been no merger, and the banking company's mortgages were then alive, and if the banking company and Woodside intended when he purchased that he should take all the interests and rights which the banking company held in and to the property, and if, under such circumstances, no merger or extinguishment of the banking company's mortgages occurred, in equity, when Woodside acquired the title, yet when the banking company subsequently, and at his instance and request, deliberately marked the mortgages satisfied, and had them canceled of record, they never having been assigned to Woodside, there was then manifested *an express and unequivocal intention on the part of both*

Woodside and the banking company that the liens of its mortgages should no longer exist,—that they should merge in the title which Woodside acquired,—and such intention became effective, and the mortgages were extinguished. It has been uniformly held, in the application of the equitable doctrine concerning merger, that the intention, when expressed, of the person in whom the two estates or interests meet, must control. * * * 'It cannot be doubted that the law will look to the intention of the parties, and the interest of the plaintiff, in order to determine whether the mortgage is to be regarded as paid and canceled. The fact that it was canceled of record will not avail to discharge the mortgage if the parties intended that the lien should continue, and the plaintiff's interests demanded it. But if the parties intended to discharge the mortgage, and the debt was in fact paid, and not transferred to the plaintiff, the cancellation must stand, and the lien be regarded as discharged. The mere fact that plaintiff's interests would have been better protected by permitting the lien to stand will not control against the intention, clearly established. The law will permit a party in such a case, as in others, to act and contract in a manner which would not result to his interest.' See Campbell v. Carter, 14 Ill. 286. The satisfaction and cancellation of the banking company's mortgages seem to have been made under a mistake of fact, that Lippold had abandoned his mortgage and would make no effort to foreclose it. While equity will grant relief against a mistake of fact, it is well settled that such a mistake must be of such a nature that it could not by reasonable diligence, have been avoided at the time. Equity will not relieve against the results of culpable and inexcusable negligence. By the exercise of the slightest diligence on the part of Woodside and

the banking company, they could have readily ascertained the intention of Lippold in reference to the enforcement of his mortgage. It does not appear that he or his attorney ever intimated that the mortgage had been abandoned. The attorney for the banking company gave as a reason for the satisfaction and cancellation of the company's mortgages that the attorney for Woodside reported that he had had an interview with the attorney for Lippold, and that Lippold would not enforce his mortgage. Equity will not grant relief under such circumstances. The verdict being demanded by the undisputed facts, there was no error in refusing to grant a new trial." (Italics ours.)

Woodside v. Lippold, 39 S. E. 400, 401-402; 84 Am. St. Rep. 267.

Beacham v. Gurney (Ia.), 60 N. W. 187, 188,

was an action to foreclose two mortgages on real estate. The defendants, Waterman and others, in their answer and cross-bill set up judgments in their favor, and asked that they be established as first liens against the property, alleging that plaintiff's mortgage lien had been lost by reason of his having taken title to the land under an agreement to discharge and release the mortgage debt. Decree was entered against the plaintiff and in favor of the cross-complainants, and was affirmed on appeal, the court saying that the evidence showed

"that it was agreed that said deed was in full of all claims against Gurney, including the mortgages in suit, which were to be satisfied, and the notes and mortgages delivered to Gurney; that this deed from Gurney and wife was given and accepted in payment of Gurney's notes and mortgages to the Lombard Company, and which were then held by Beacham;

that Firman, in paying for this land, dealt only with the Lombard Company; that the transaction by Jones in behalf of Lombard and of the Lombard Company was intended as a satisfaction and cancellation of the mortgages; that at the time said deed was taken by Jones, it was *with full knowledge of the judgments of the cross-petitioners.*"

And concluded:

"From these and other facts it is clear that, in taking the deed to the land, it was the intention to cancel and discharge the debt.

"It is contended that the mortgages should be kept alive for the benefit of plaintiffs. Authorities need not be cited to sustain the doctrine that a mortgagee may take a conveyance of the mortgaged premises, and still, as against creditors of the mortgagor, keep his lien alive, as superior to their claims. In such a case, in the absence of evidence to the contrary, the presumption often obtains that it was the intention of the parties to keep alive the mortgage lien, and especially is this the case where such a result is manifestly for the interest of the mortgagee. But this rule does not obtain when it is clear that the intention was to satisfy the debt as to all parties. Weidner v. Thompson, 69 Iowa 37, 28 N. W. 422. Here all the facts show that there was no intention to keep alive the mortgage. On the contrary the debt was paid, and the parties intended that the lien of the mortgages should be discharged. It matters not what moved them to so act as to have the transaction operate as a payment and satisfaction of the debt. They ought not to complain if their acts are given the force and effect which it is clear they intended that they should have." (Italics ours.)

Beacham v. Gurney, 60 N. W. 187, 188.

In *Errett v. Wheeler* (Minn.), 123 N. W. 414, 416, 417, plaintiff was the holder of a deed prior in time to defendant's, but defendant's, second in time, was first recorded. In an action to determine adverse claims to the property the court found (1st) that defendant had notice of the prior deed at the time he obtained his title and (2nd) that whether or not he had such notice at the time he acquired his title, he did have notice at a subsequent date when he satisfied his mortgage on the property, and was not entitled to judgment reinstating the satisfied mortgage. In affirming the judgment the court said:

> "* * * But where the mortgagee, or other holder of the mortgage, voluntarily discharges the same, he pays no money to a third person to whose rights he ought in equity to be substituted, and the principles of the law of subrogation do not apply. The grounds usually made the basis of relief from satisfied mortgages, judgments, or other liens upon real property are fraud or mistake—mistake of fact, or, perhaps, mistake of both law and fact, and in exceptional cases mistake of law. The authorities are collected and commented upon in a note to Attkisson v. Building Ass'n, 58 L. R. A. 788. And although a case might arise where a mortgagee would be compelled before payment to satisfy a mortgage still owned and controlled by him, in order to protect other rights in the property, and thus give rise to the right of cancellation in equity under the analogous doctrine of subrogation, it is clear that such is not this case. There can be no claim here that the mortgage in question, which had been assigned to defendant and was then wholly under his control, was satisfied by him to protect any right or interest in the property which was jeopardized by its presence on the record.

"We therefore pass to the question whether any other recognized ground for the relief sought, fraud or mistake, is shown by the record. No fraud is claimed, and it is clear that relief cannot be granted on that ground. The satisfaction was the voluntary act of defendant, without inducement or suggestion from plaintiff. Nor do we find any substantial reason for disturbing the conclusion of the trial court that there was no mistake of fact. Defendant was the owner of the mortgage, and, under the findings, satisfied it of record with knowledge of plaintiff's deed. He was informed of that deed at the time of its execution, three years before the transaction in question, and again two days before he satisfied the mortgage. He was, with respect to this property, an adversary of plaintiff, who was under no obligation to pay the mortgage, and in the face of her claim of title to the property discharged it, not to protect any interest of his likely otherwise to be prejudiced, or because of any fraud or unfair dealings on the part of plaintiff, but to perfect a title claimed by him to be adverse and superior to that held by plaintiff. Clearly, under such circumstances, he is not entitled to relief. Wadsworth v. Blake, 43 Minn. 509, 45 N. W. 1131; Emmert v. Thompson, 49 Minn. 386, 52 N. W. 31, 32 Am. St. Rep. 566; Faurot v. Neff, 32 Ohio St. 44; Atkinson v. Plum, 50 W. Va. 104, 40 S. E. 587, 58 L. R. A. 788, and cases there cited.

"Nor is defendant entitled to relief on the theory that he mistook his legal rights, or did not understand the legal effect of the cancellation of his mortgage. Mistake of law, unattended by any misunderstanding of the facts, presents, as a general rule, no ground for the interposition of equity. * * *

"Ignorance of the law was held, in Garwood v. Eldridge's Adm'rs & Heirs, 2 N. J. Eq. 145, 34 Am.

Dec. 195, no ground for equitable relief. It appeared in that case that plaintiff purchased certain land which was incumbered by two mortgages. With the consent of the vendors he applied the purchase price of the land in payment of the mortgages and procured their discharge of record. Subsequent to the execution of the mortgages, but before plaintiff obtained his deed for the property, a third person obtained a judgment against the mortgagor, which was a lien upon the land. After the satisfaction of the mortgages, the judgment creditor proceeded to enforce his judgment, and plaintiff brought the action for a reinstatement of the mortgages on the ground of mistake of both law and fact. The court held that relief could not be granted on the ground of mistake of law, and that there was no mistake of fact; for plaintiff could have ascertained the existence of the intervening judgment by consulting the record. The case at bar is much stronger; for here defendant had actual notice of plaintiff's deed. In the case of Talbot v. Garretson, 31 Or. 256, 49 Pac. 978, it was held that, before a court of equity can interfere and restore the lien of a mortgage canceled by mistake, it must appear that at the time of such cancellation the mortgagee did not know of the intervening lien over which he desired to obtain priority by the decree prayed for. In the course of the opinion in that case the court said: 'This is so elementary that its mere statement is sufficient. Manifestly a mortgagee, who, with complete knowledge of the existence of another lien on the mortgaged premises, deliberately cancels and releases his security, cannot subsequently ask a court of equity to restore him to his original priority.'

* * * * * * * *

"Defendant erroneously assumed that his title was superior to plaintiff's because his deed was first re-

corded; and from this error, one solely of law, no equitable relief can be granted on the facts disclosed."

Errett v. Wheeler, 123 N. W. 414, 416, 417.

The rule is the same in the English courts.

In *Emmons v. Crooks,* 1 Grant's Chancery 159, 167-168, a third mortgagee, who took his mortgage without notice of a second mortgage or annuity, but thereafter obtained an assignment in his favor of the first mortgage after he had notice of the second mortgage or annuity, and then took a conveyance from the mortgagor, was held to have merged his incumbrances so that the second mortgage or annuity was the only subsisting incumbrance on the property, the court saying:

"Whether reason and the authorities do not establish that the burden of proof should rest in the one class upon the party asserting a merger, and in the other upon the party denying it, we do not now decide, because we are not about to determine anything inconsistent with the case in appeal. On the contrary, the present case falls clearly within the authority of Street v. The Commercial Bank. Here both Shaw and the defendant had clear notice of the plaintiff's incumbrance, before entering into the contracts under which they acquired the inheritance. We are not aware of any decided case opposed to the conclusion at which we have arrived. * * *

"But the circumstances of this case, as detailed in the pleadings, leave, we think, no room for controversy. Here Shaw, with a full knowledge of the plaintiff's annuity, petitions for a sale of the estate, in order to pay off his incumbrances; and the defendant sets up, in his answer, that upon the sale made under that petition Shaw did acquire the inheritance,

free from all incumbrance. Now, whether we regard this transaction as payment of those charges, which cannot now be set up again under Toulmin v. Steere, or as an acquisition of the inheritance, as in Parry v. Wright, we cannot doubt that the parties have manifested a clear intention to merge these charges, and that it is therefore impossible for the court to give effect to the deeds in question, contrary to that intention."

Emmons v. Crooks, 1 Grant's Chancery 159, 167-168.

Toulmin v. Steere, 36 Eng. Rep. 81; 3 Merivale 211.

In this case the holder of an annuity charged against certain real estate brought an action to enforce the charge against purchasers of the property. The property in question formerly belonged to a Mr. Witts. Plaintiff purchased from him an annuity of £180 secured by this estate, but subject to a mortgage to a Mr. Harrison for £5,000. Subsequently, a mortgage for £3,000 was given to a Mr. Wilby. There was no evidence to show whether or not he had notice of the annuity and thereafter defendants took a conveyance of the property. Mr. Wilby having paid off Harrison and taken an assignment of the mortgage, joined in the conveyance to the defendants. The court held that the plaintiff was entitled to have his charge considered as a first lien against the estate and was not required to redeem encumbrances which at one time had been prior to the annuity. Decision was in plaintiff's favor on the issue, first, of whether the purchaser had bought the property with notice of the plaintiff's charge and, second, as to whether the defendants might require the charge to be paid off only after the prior liens of

which they must be considered as the owners, but which had been discharged. The court said, with reference to this second issue:

> "If the annuity is to be considered as an incumbrance on this estate in the hands of the present owners, the next consideration is, in what order it is to be paid. The charges that preceded it have ceased to exist. They are all paid off and extinguished. The plaintiff contends, that the annuity is now to be considered as the sole charge affecting the estate. The defendants say, it is only to be paid in the order in which it originally stood, and that the purchasers must be considered as the owners of the antecedent charges, and entitled to retain, in the first place, so much as would be sufficient to keep down the interest of them. Supposing Mr. Witts himself had paid off all the other incumbrances, the annuitant would have stood in the same situation as if she had been from the beginning the sole incumbrancer. He could not have said 'I will retain for myself so much of the rents and profits as would have been required to keep down the interest of the other charges, and you must take your chance of there being enough left to pay you your annuity.' In effect Witts has paid off the other incumbrances; for they have been paid out of the purchase money, and he has received so much less for his estate than he otherwise would have done. Then, what equity can the purchasers have, to consider them as still subsisting as against any person claiming under Witts? They are in no worse situation than they would have been if they had bought an estate on which there was no mortgage, but which turned out to be encumbered with an annuity, not known to them in fact, but constructively known to them by means of notice to their agent. In that case, would they be permitted to say, there was a time

when there was a charge upon the estate prior to the annuity, and therefore, as between the annuitant and us, that charge shall be considered as still existing? The cases of Greswold v. Marsham (2 Cha. Ca. 170), and Mocatta v. Murgatroyd (1 P. Wms. 393), are express authorities to shew that one purchasing an equity of redemption cannot set up a prior mortgage of his own, nor consequently a mortgage which he has got in, against subsequent incumbrances of which he had notice."

Toulmin v. Steere, 36 Eng. Rep. 81, 86; 3 Merivale 211.

The rule is the same in cases where a purchaser of property who has discharged an incumbrance seeks to be subrogated to the lien of the incumbrance as against the holders of other incumbrances of which he had notice.

Benenson v. Evans (Ga.), 134 S. E. 441, 444:

"Unquestionably a purchaser of property who has discharged an incumbrance thereon at the request of the debtor will be subrogated to the lien of such incumbrance as against the holders of other incumbrances of which he had no notice, *but not as against the holders of other incumbrances of which he had notice, either actual or constructive.*" (Italics ours.)

Benenson v. Evans 134 S. E. 441, 444.

Frazee v. Inslee, 2 N. J. Eq. 239, 242.

This was a suit to foreclose a mortgage which, while prior in time, was not placed on record until after defendant's mortgage. After complainant's mortgage had been recorded defendant canceled his mortgage of record and took a deed from the mortgagor for the property. In his answer defendant alleged he was a *bona fide* purchaser

without notice and entitled to hold the premises by virtue of his deed or that his mortgage should be revived as against the plaintiff. In rendering a decree for the plaintiff the court said:

> "In the absence of any proof of fraud by the complainant, or his agent, when the mortgage was canceled intentionally and understandingly by the defendant, and a deed taken for the same property, I cannot upon any safe principle revive the mortgage, or prevent the complainant from reaping the benefit of his rights as a first mortgagee. This would be giving encouragement to negligence, and destroy the value of a public record. It is to be observed, that the defendant has no certificate from the clerk of any search, but the evidence is, that the clerk's deputy told him, upon enquiry, that there were only certain incumbrances on the property, omitting that of the complainant. It further appears, from the testimony of Jeremiah Crocheron, that before taking the deed he mentioned to the defendant, Campbell, the existence of this mortgage—that he got his information from Inslee; to which Campbell said, he would run the risk of that, for he had searched. This information, coming directly from Inslee, should, at any rate, have put him on enquiry and more diligent investigation."
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> *Frazee v. Inslee,* 2 N. J. Eq. 239, 242.

It follows from the foregoing cases that if, at the time claimant satisfied and discharged its mortgage and delivered up the note representing the indebtedness secured thereby, it had actual or constructive knowledge of the facts giving rise to libelant's lien, then the lien of claimant's mortgage ceased to exist and no longer takes priority over libelant's lien.

III.

The Mere Fact That by the Provisions of Respondent's Mortgage the Owner Agreed Not to Suffer or Permit Any Lien to Be Incurred Against the Vessel, Did Not Prevent Libelant From Obtaining a Lien Against the Vessel Subsequent to the Lien of Respondent.

In the opinion of counsel for appellant, the case of *Morse Drydock & Repair Co., Petitioner, v. S. S. "Northern Star"*, 271 U. S. 552; 70 L. ed. 1082. is conclusive of this issue. The attitude toward this decision taken by the trial judge is, we submit, totally without precedent in American jurisprudence. The necessary ground of that decision, which is apparent from the opinion of the Supreme Court itself, as well as from that of the Circuit Court of Appeals and of the District Court (as we shall later show), was the existence of a lien on the part of the repair man. Yet the trial judge, in the opinion herein, denominates that portion of the decision discussing the existence of a lien in favor of the repair man as "dicta" and not controlling. Although the decision was concurred in by seven other justices, the opinion below refers to a dissenting opinion of Justice McReynolds as indicating that the Supreme Court was not unanimous "as to the ineffectiveness of the clear language of the Ship Mortgage Act to defeat liens such as that claimed by the libelants herein". In fact the entire opinion below is nothing more than an elaboration of the dissenting opinion of Justice McReynolds in the "Northern Star" case, an opinion which was rejected by all the other justices of that court.

The opinion of the Circuit Court of Appeals in the "Northern Star" case is reported in 7 Fed. (2d) 505, and the opinion of the District Court in 295 Fed. 366. The

libelant sought to establish a lien for repairs. Intervenor Luber set up a purchase money mortgage executed by the owner to the United States Government, which had been assigned to Luber. Both the District Court and the Circuit Court of Appeals decided in favor of the mortgagee, the District Court holding that under the terms of the mortgage by which the mortgagor was precluded from suffering or permitting any lien that might have priority over the mortgage, claimant never acquired any lien against the vessel and the owner had no power to bind the vessel. The District Court said:

> "Under the law as quoted, I am of the opinion that Mr. Garmey had no authority to bind the vessel, nor did the American Star Line, Inc., through whom his authority, if he had any, must have come, have any authority itself to bind the vessel, because of the prohibition contained in said mortgage, *even if the said mortgage were not a preferred mortgage.*"
>
> *The Northern Star,* 295 Fed. 366, 369.

We are calling the court's attention particularly to this portion of the decision, as we anticipate that claimant will make some attempt to distinguish the "Northern Star" case on the ground that the mortgage there was finally held not to be a preferred mortgage. We think it is obvious, as stated by the trial judge in the "Northern Star" case, that the effectiveness of the prohibition contained in the mortgage does not depend on whether the mortgage is a preferred mortgage.

Referring to the limitation of the owner's authority in the mortgage, the District Court said:

> "Holding, therefore, as I do, that by the terms of said mortgage the American Star Line, Inc. was prohibited from creating a maritime lien for the repairs

made by the libelant, and that such prohibition comes under the term 'for any other reason,' as set forth in said subsection R, there can be no doubt that, had libelant exercised reasonable diligence, it could have ascertained the fact, because inquiry at the office of the American Star Line, Inc., the records of the collector's office in the custom house, both in New York City, of Mr. Garmey, or of the captain or officer in charge of the ship, would have furnished libelant with complete information."

The Northern Star, 295 Fed. 366, 370.

The court further held that the intervenor's mortgage was a preferred mortgage and that the provision requiring that the mortgage be endorsed on the ship's papers was directory and not merely mandatory.

The Circuit Court of Appeals said, at page 505:

"The questions presented to us are (1) whether the appellant has a maritime lien because of the work, labor, and services performed in repairs to the vessel; and (2) whether the appellee (Luber's) preferred mortgage has a preferred status from August 11, 1920, the date of its recordation in the custom house at the Port of New York; and (3) whether it takes priority over the appellant's claim, assuming that the appellant has a lien."

And at page 506:

"It will be observed from the foregoing provision of the mortgage that the owner covenanted not to permit a prior lien to the mortgage. The conveyance of the vessel to the American Star Line, Inc., was absolute, and, when the appellant finished its work pursuant to its employment by an authorized agent, it had a lien on the vessel pursuant to the terms of

> the Ship Mortgage Act of 1920 (subdivisions P, Q. R [Comp. St. Ann. Supp. 1923, Secs. 8146¼ooo-4146¼pp]), but whether it ranks ahead of the mortgage of Luber depends upon whether that mortgage is a preferred mortgage under the provisions of the Ship Mortgage Act. If that mortgage may not be deemed a preferred mortgage, then the appellant's lien is senior in rank."
>
> *The Northern Star,* 7 Fed. (2) 505, 506.

The Supreme Court, 271 U. S. 552, held that the repair man obtained a lien despite the prohibition contained in the mortgage and further held that this lien took precedence over the mortgage which, due to the failure of the Collector of Customs to make the necessary endorsement on the ship's papers, was not a preferred mortgage under the statute. The express holding of this case is that the limitation of the owner's authority to bind the vessel contained in the mortgage is absolutely ineffective, for, by the terms of that clause, the owner was prohibited from incurring a lien which might become prior to the mortgage, *which was exactly what the Supreme Court permitted him to do.* The necessary effect of the holding in the "Northern Star" case is that *any* clause in a mortgage purporting to limit the authority of the mortgagor to incur liens is ineffective to prevent the attaching of a lien. If the provision in that case did not prevent the mortgagor from incurring a lien "which has or might have priority" over the mortgage, the provision in the mortgage in this case did not prevent the incurring of a lien inferior to claimant's mortgage. We are not, of course, contending that the lien of libelant was at any time, prior to discharge of claimant's mortgage, superior to it. In the opinion of the Supreme Court, it is stated:

"The repairs were made between November 14 and November 27, 1920, at the owner's request. One of the covenants of the mortgage was not to suffer or permit to be continued any lien that might have priority over the mortgage, and in any event within fifteen days after the same became due to satisfy it. Another covenant, probably shaped before the then recent Ship Mortgage Act, 1920, June 5, 1920, chap. 250, Sec. 30, 41, Stat. at L. 988, 1000, Comp. Stat. Sec. 8146¼jjj, Fed. Stat. Anno. Supp. 1920, p. 251, required the mortgagor to carry a certified copy of the mortgage with the ship's papers, and to take other appropriate steps to give notice that the owner had no right to permit to be imposed on the vessel any lien superior to the mortgage. On these facts we feel no doubt that the petitioner got a lien upon the ship, as was assumed by the Circuit Court of Appeals. Ship Mortgage Act, subsection P, 41 Stat. at L. 1005.

The owner of course had 'authority to bind the vessel' by virtue of his title without the aid of statute. The only importance of the statute was to get rid of the necessity for a special contract or for evidence that credit was given to the vessel."

Morse Dry Dock & Repair Company, Petitioner, v. Steamship Northern Star, 271 U. S. 552.

If, as stated in the opinion of the Supreme Court, the owner's "authority to bind the vessel" exists without the aid of statute, then that authority is not affected by the provision of a statute requiring the supply man to use reasonable diligence to ascertain whether, by reason of certain agreements, the person ordering the supplies had no authority to bind the vessel. Subsection R does not take away or purport to take away any authority not granted by the preceding subsection Q of the statute.

(A) The Fact That Claimant's Mortgage in This Case Had the Status of a Preferred Mortgage Is Immaterial.

As we have already seen, the trial judge in the Northern Star case specifically stated that the limitation on the power of the owner to bind the vessel was equally effective whether the mortgage was preferred or not. The circumstance that in the present case the mortgage is conceded to be preferred is immatrial, for the reason (a) that it is not necessary for libelant herein to establish that its lien was at any time prior to the lien of the preferred mortgage that has been discharged; and (b) the fact that the mortgage was a preferred mortgage in this case did not charge the libelant with any greater degree of diligence to ascertain its terms than if the mortgage had not been preferred or the prohibition had been contained in any other duly recorded provision coming within the provisions of subsection R of the Act. The only difference between the "Northern Star" case and the present case is that in the "Northern Star" case the repair man sought to obtain preference over the mortgage, while in this case the sole question is whether the libelant obtained a lien. This question, however, was equally involved in the "Northern Star" case and this was recognized by all three courts passing on that case in reaching their decisions. Libelant in the "Northern Star" case had to establish not only that he had obtained a lien, but that the mortgage was not a preferred one, while in the present case all the libelant has to establish is that a lien was obtained.

(B) Cases Involving Limitations of the Authority of Charterers, Purchasers on Conditional Sale or Persons Other Than the Owners of Vessels Are Not in Point.

Claimant's counsel cited to the trial court, and the trial court apparently relied somewhat upon a number of cases in which under the provision of subsection R of the Ship Mortgage Act a charterer or purchaser under contract of conditional sale has been held to be without authority to bind the vessel, by reason of a limitation contained in the agreement, charter party or conditional sale from the owner. Obviously, such cases, which do not involve a prohibition contained in an agreement *executed by the owner* of a vessel, have no bearing on any issue in the present case, which involves only the question of the right of the owner to bind the vessel owned by him, regardless of the terms of a mortgage which he may have executed. The owner has such authority without the aid of statute. (Northern Star case, 271 U. S. 552.) A charterer or person other than the owner does not have such authority without the aid of statute. Consequently, to such latter party subsection R of the Ship Mortgage Act applies, but it does not apply to the case of an agreement executed by the owner.

(C) The Provision of the Mortgage in This Case Purporting to Forbid the Owner Incurring Any Lien Whatever Is Invalid as a Clog on the Equity of Redemption.

The limitation of the owner's authority contained in the "Northern Star" case was not necessarily a clog on the equity of redemption, inasmuch as it only purported to forbid the owner from incurring a lien which might be-

come superior to the mortgage. Such clause might be justified, but the clause in the present case is not in anywise justifiable. The holder of a preferred mortgage does not require the protection of such a clause. It affords him no additional security. No lien can attach which is superior to his mortgage, and his mortgage, until discharged by him, will necessarily prevail against all liens except certain special liens specified in the Ship Mortgage Act. It follows that the provision in the claimant's mortgage, so far as it attempts to limit the exercise of the equity of redemption, by precluding persons furnishing supplies and other necessaries from exercising this right of redemption, is invalid as a clog on the equity of redemption. As stated in 3 Pomeroy Equity Jurisprudence, page 2826, Sec. 1193, Note 1,

> "The doctrine is universal in its application, it underlies many special rules of equity. It extends to stipulations limiting the time of redemption, *or the parties who may redeem.*"

The necessary effect of the provision in question and the very purpose for which it is invoked in the present case, is to limit the parties who may redeem. There can be no substantial distinction between a clause providing that the mortgagee shall have no power to create liens of a certain character and a clause providing that lienors of a certain character shall have no right of redemption. The only purpose and the only effect either clause can have in a mortgage is to restrict or limit the equity of redemption. No device, whatever its form, will be allowed to have this effect.

CONCLUSION.

It is respectfully submitted that the foregoing points establish that there was no evidence below which justified the decree entered and that the court erred in refusing to make the findings requested by libelant. The uncontradicted evidence shows that claimant, with knowledge of the circumstances giving rise to libelant's lien, intentionally and deliberately cancelled its mortgage and accepted a conveyance from the mortgagor of the respondent vessel. The decision below cannot be reconciled with the decision of the Supreme Court in the "Northern Star" case, 271 U. S. 552, and in fact constitutes a definite refusal to follow the law as pronounced in that decision. It is submitted that that portion of the opinion of the Supreme Court dealing with the question of whether the libelant in that case obtained a lien is not only not dicta, but is a necessary ground of the decision, and whether dicta or not, correctly states the law, and in the absence of opposing authority (of which there is none) is absolutely controlling in this case.

For each and all of the foregoing reasons, it is earnestly submitted that the decree below should be set aside and that an order be made for the entry of a decree in favor of libelant.

Respectfully submitted,

H. F. Prince,

Gibson, Dunn & Crutcher,

By H. F. Prince,

Proctors for Libelant and Appellant.

No. 6866

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

Pan American Petroleum Company, a corporation,
Libelant and Appellant,

vs.

Oil Screw Bergen, her engines, machinery, boilers, boats, tackle, apparel and furniture, etc.,
Respondent,

Star and Crescent Boat Company,
Claimant and Appellee.

Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Brief for Appellee

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TOPICAL INDEX

TABLE OF CASES AND AUTHORITIES CITED

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BRIEF FOR APPELLEE.

For the convenience of the court we preface this brief with a short statement of the essential facts in chronological order. For the most part these facts were stipulated to at the trial.

The Undisputed Facts.

The Oil Screw "Bergen", the respondent vessel, was owned by the appellee, Star and Crescent Boat Company, a corporation, whose principal place of business was at San Diego, California. On September 20, 1927, the vessel was sold by the appellee to John E. Heston, then engaged in the

fish business at San Pedro, California. To secure the payment of the balance of the purchase price amounting to the sum of $40,000.00 Heston, as a part of the transaction, executed a preferred mortgage on the vessel. (Rec. p. 41.)

Article III of said preferred mortgage provided as follows, (Rec. p. 25):

> "Neither the Mortgagor nor the Master of the Vessel shall have any right, power or authority to create, incur, or permit to be placed or imposed upon the property subject, or to become subject to this mortgage, any lien whatsoever other than for crew's wages, wages of stevedores and salvage."

On October 21, 1927, said preferred mortgage was duly recorded in the office of the Collector of Customs of the Port of Los Angeles. (Rec. p. 42.) This was the home port of said vessel and was also the residence of the owner of said vessel. (Rec. p. 42.) The record on file in the office of the Collector of Customs showed the name of the vessel, the parties to the mortgage, the time and date of the reception of the mortgage, the interest in the vessel mortgaged and the amount and date of the maturity of the mortgage in accordance with section 30, subsection 3, of the Act of June 5, 1920. (Rec. p. 42.)

The mortgage was endorsed upon the documents of the respondent vessel and contained the affidavit that the same was made in good faith and without design to hinder, delay or defraud any existing or future creditors of the mortgagor or any lienor of said vessel. (Rec. p. 42-43.)

All things necessary to entitle said mortgage to the status

of a preferred mortgage under the Ship Mortgage Act were done. (Rec. p. 43.)

A certified copy of the preferred mortgage was placed on board the respondent vessel and kept with the ship's documents. (Rec. p. 43.)

The "Bergen" was employed by Mr. Heston as a "tender" for the purpose of transporting supplies to a fleet of small fishing boats owned and operated by him off the coast of Lower California and in bringing back to San Pedro the catch of these small fishing boats. (Rec. p. 40 and p. 62.)

While so employed and during the months of September and October, 1928, the libelant, Pan American Petroleum Company, a corporation, furnished to the vessel gasoline and fuel oil upon the order of Heston, the total purchase price of which was $2,062.31. (Rec. p. 37.) Gasoline and diesel oil of the value of $1,287.61 was used by the "Bergen" and the balance thereof was delivered to the small fishing boats owned and operated by Mr. Heston in Turtle Bay. (Rec. p. 40.)

At the trial libelant waived any claim of lien for the gasoline and fuel oil delivered to the small fishing boats, conceding that no maritime lien upon the "Bergen" would result therefrom.

During the month of November, 1928, Mr. Heston defaulted in the payment of the installments of principal and interest provided for in the promissory note secured by the preferred mortgage. (Rec. p. 44.)

Thereafter, during the latter part of the year, 1928, and

the spring of 1929, several conversations were had between Mr. Heston and Capt. Hall, President of the appellee corporation, regarding the past due installments. An agreement was finally arrived at whereby in lieu of foreclosing the preferred mortgage the Star and Crescent Boat Company accepted a bill of sale of the "Bergen" from Mr. Heston and caused the preferred mortgage to be satisfied of record. (Rec. p. 44.) This agreement was consummated on or about May 1, 1929, by the recording of a satisfaction of the mortgage and a bill of sale from Mr. Heston to the appellee.

At the trial evidence was adduced by both libelant and claimant bearing upon the question of whether the Star and Crescent Boat Company had notice of the existence of libelant's claim of lien against the "Bergen" at the time it accepted from Mr. Heston a bill of sale of the vessel and caused the preferred mortgage to be satisfied of record. In this connection the trial court found as follows:

> "that it is not true that during said negotiations said claimant was advised by the said John E. Heston of the approximate amount and character of the claim of the libelant herein, or what specific materials and supplies were furnished to respondent vessel; nor is it true that the claimant was advised that the said Heston anticipated that libelant would take action against respondent vessel." (Rec. p. 55.)

The Specifications of Error.

An analysis of the specifications of error relied upon by the appellant, a statement of which appears at page 8 of appellant's brief, is next in order. Appellant relies upon Assignments of Error Numbered I to IX, inclusive. These

assignments appear in the record at pages 74 to 76. No reliance upon the Assignments of Error, Numbered X, XI, and XII is indicated and in accordance with the rules of this Court said assignments will be disregarded in this brief.

Assignments of Error Numbered I to VIII inclusive, may be collectively considered as they are all directed to the above quoted finding of fact made by the trial court and to the refusal of the trial court to grant appellant's requested findings in lieu thereof.

Assignment of Error Numbered IX is directed to the conclusion of law whereby the trial court found (Rec. p. 56), "That libelant acquired no lien against the respondent vessel, her engines, machinery, boilers, boats, tackle, apparel and furniture, etc."

Abstract of Appellant's Argument.

Appellant in its brief has made three points which in substance are as follows, (Appellant's Brief, pp. 9-10):

First: The appellee had either actual or constructive notice of appellant's claim at the time it accepted the conveyance of the vessel from Heston in satisfaction of the preferred mortgage.

Second: The preferred mortgage was merged in the conveyance and lost its priority over junior liens.

Third: Appellant obtained a lien upon the vessel subsequent to that of the appellee.

Logically, the third point made by appellant should first be determined, for, unless the appellant acquired at least a

junior lien as a result of the admitted delivery of supplies to the "Bergen" the argument need be pursued no further, and it matters not whether the mortgage later was merged in the conveyance, or whether appellee had notice of libelant's claim, if that claim did not constitute a lien. The existence of a lien is the very foundation of a proceeding *in rem,* and unless appellant acquired a lien in the first instance the decree of dismissal of the libel followed as a matter of course. However since libelant in its brief has adopted a different order of presentation we shall follow that order and consider appellant's points *seriatim.*

In fairness to this court, however, we wish to point out that the primary question presented upon this appeal is whether a lien was acquired by libelant, and if this court determines, as did the trial court, that no lien was acquired, then it need not consider the other points raised by appellant's brief and answered herein, for even if appellant's position upon the question of notice and merger were sound it would avail it nothing in the absence of a lien upon the vessel.

ABSTRACT OF ARGUMENT IN BEHALF OF THE APPELLEE.

On this appeal we make the following contentions:

I.

At No Time Prior to the Date it Received the Bill of Sale of the "Bergen" from Mr. Heston did the Appellee Have Actual or Constructive Notice of Appellant's Claim Against the Vessel, and the Finding to this Effect by the Trial Court is Fully Supported by the Evidence.

II.

The Preferred Mortgage Held by Appellee was at All Times a First Lien Upon the "Bergen" and Despite its Cancellation and the Acceptance by Appellee of a Conveyance No Merger Resulted.

III.

The Trial Court Correctly Concluded That the Libelant Acquired No Lien Whatever Upon the Respondent Vessel.

ARGUMENT.

I.

At No Time Prior to the Date it Received the Bill of Sale of the "Bergen" from Mr. Heston did the Appellee Have Actual or Constructive Notice of Appellant's Claim Against the Vessel, and the Finding to this Effect by the Trial Court is Fully Supported by the Evidence.

Although appellant contends that it "conclusively appears" from the record that appellee was "fully advised" of libelant's claim the trial court found otherwise, and this finding is amply supported by the evidence, which "conclusively" demonstrates the absence of notice.

There most certainly was nothing in evidence upon which appellant could possibly base a claim of constructive notice. It is provided in 46 U. S. C. A. 925, as follows:

> "(a) The collector of customs of the port of documentation shall upon the request of any person record notice of his claim of a lien upon a vessel covered by a preferred mortgage, together with the nature, date of creation and amount of the lien and the name and address of the person."

Libelant however caused no claim to be recorded. Had libelant seen fit to record its claim of lien instead of maintaining it in secrecy this litigation would doubtless have been avoided.

The evidence falls short of establishing actual notice. It is true that Mr. Heston testified upon direct examination that he told Captain Hall that he (Mr. Heston) "owed a large sum of money to the Pan American Petroleum Company." (Rec. p. 60); that he had considerable "accounts out which were against all his boats"; "that some of the account of the Pan American Petroleum Company was incurred by the 'Bergen'." However upon cross-examination he testified as follows, (Rec. p. 63):

> "Q. Now, precisely, if you know what did you say in that conversation, Mr. Heston?
> A. Why, I said there had been no liens filed.
> Q. There had been no liens?
> A. There had been no liens filed, and the fact that if I had a good spring season this year I could work out of all my difficulties and pay all the bills that I owed."

He further testified that he did not remember receiving a letter from the attorneys for the Star and Crescent Boat Company which contained the statement, (Rec. p. 63):

> "We have requested Mr. Chandler, before consummating the transaction, to ascertain whether or not the records show any liens or encumbrances subsequent to the mortgage. In the event that the existence of subsequent liens is indicated, the document should not be recorded until an adjustment is arranged with the lienholders."

Upon re-direct examination Mr. Heston was interrogated about his conversation with Mr. Chandler and testified, (Rec. p. 64) as follows:

> "Q. Was anything said at that time about any liens against the boat?
> A. The main part of the conversation was getting these documents recorded. As I recollect it, he said, 'You have got no bills out', and I said, 'Well, there is plenty of bills out, but there has been no liens—but there has been no liens filed against the boat. As far as the boat record is concerned, it is clear yet.' Of course, at this time I expected to work out of these difficulties.
> Q. When you say 'No liens filed', you mean no suits filed?
> A. There had been no suits filed, no.
> Q. Which did you say?
> A. I said there had been no suits filed or liens filed at that time. I thought a lien was a suit.
> Q. You thought a lien was a suit?
> A. Yes."

In contrast with the testimony of Mr. Heston, Captain Hall testified unequivocally and positively as follows:

> "* * * That it was in June or July, 1929, when he first learned that the Pan American Petroleum Company claimed a lien on the 'Bergen' for supplies furnished during the fall of 1928. That he could fix the date when he first learned of the claim of the Pan American Petroleum Company by referring to a letter from the Pan American Petroleum Company which was dated July 3, 1929. That prior to that time he had no knowledge of the existence of this claim. * * *" (Rec. p. 55.)

He further testified, (Rec. p. 65):

"* * * That nothing was said at that time with reference to a claim against the 'Bergen' for fuel, oil or supplies. That he did not understand at that time that the Pan American Petroleum Company had any claim against the 'Bergen.' * * *"

He also said, (Rec. p. 66):

"* * * That he did not know that there was any account held against the 'Bergen'. * * *"

And, (Rec. p. 66):

"* * * That he had several later conversations with Mr. Heston with regard to making the past due payments on the boat, but that he did not remember anything being said about any claim of the Pan American Petroleum Company or others against the 'Bergen' in any of these conversations."

He further said, (Rec. p. 67):

"* * * That when the claimant accepted back the bill of sale of the 'Bergen' and delivered the satisfaction of mortgage, it did not have any knowledge of the existence of the claims against the vessel at all. * * *"

Also he testified, (Rec. p. 69):

"* * * That he requested Mr. Chandler in San Pedro to make investigations there to see if there were any bills. * * *"

In support of Captain Hall's oral testimony and corroborating it in all particulars is claimant's Exhibit "B", being a letter written by Captain Hall to Mr. R. J. Chandler, an

officer of the claimant, at Wilmington, dated April 4th, 1929, which reads, in part, as follows, (Rec. p. 67, 68):

> "I would like to make it very clear to you, in case we take title to the 'Bergen', without foreclosing our mortgage, if there should be any liens against the vessel in the way of repairs, supplies, or in fact, any liens whatever, we would be liable for them. I would ask that you be reasonably sure that there are no liens before having title to the vessel recorded in your name. If you think there are any such claims, the best way to do would be to foreclose on the mortgage."

Captain Hall stated, (Rec. p. 68):

> "* * * That he knew all the time that if they let the thing go through the regular channels and had foreclosed the mortgage and bid the vessel in, that there wouldn't be any liability for any claim coming back on them. * * *"

He explained that the mortgage was not foreclosed because his company wanted to convert the "Bergen" into a towboat which they needed immediately and that Mr. Heston had told him that it would reflect upon his credit and embarrass him if legal proceedings to foreclose the mortgage were commenced.

It is quite apparent, we believe, that Captain Hall would not have accepted the bill of sale of the "Bergen" in lieu of foreclosing the mortgage had he been "fully advised", as appellant contends, of its claim. There obviously would have been no reason for so doing.

The principles recently laid down by this Court in *The Mabel,* 61 Fed. (2nd) 537, would seem to be controlling in

support of the trial court's findings on this question. We quote from page 540 as follows:

> "In the case of *The San Rafael,* 141 F., 270, 275, Judge Ross, speaking for this court, said: 'It is well settled, said the Supreme Court in *Irving vs. The Hesper,* 122 U. S., 256, 266, 7 S. Ct., 1177, 30 L. Ed., 1175, "that an appeal in admiralty from the District Court to the Circuit Court vacates altogether the decree of the District Court, and that the case is tried *de novo* in the Circuit Court. (Citing cases.)" '
>
> Having this principle in mind, we have reviewed the evidence in its entirety and concluded that it supports and justifies the finding and conclusions of the trial court. The testimony, consisting of that of approximately seventeen witnesses, taken in open court, is highly conflicting; and even if we were inclined to differ with the learned trial judge who saw the witnesses, heard their testimony, and had opportunity of passing upon their credibility and accuracy, we would not be warranted in interfering with his findings of fact and conclusions, 'unless the record discloses some plain error of fact, or unless there is a misapplication of some rule of law.' *Panama Mail S. S. Co. vs. Vargas* (C. C. A.) 33 F. (2d) 894, 895; *Id.,* 281 U. S., 670, 50 S. Ct., 448, 74 L. Ed., 1105; *The Lake Monroe* (C. C. A.) 271 F., 474.
>
> In the case of *Tomkins Cove Stone Co. vs. Bleakley Transp. Co.,* 40 F. (2d) 249, 252, the Circuit Court of Appeals for the Third Circuit said: 'Trying the case *de novo* from the printed record, our inclination is that the learned trial judge was right in holding the wharfinger free from negligence, but any lingering uncertainty in that regard must be resolved in favor of the fact finding of the trial judge (who saw and heard the witnesses) which will not be disturbed by an appellate court unless shown by the evidence to be clearly wrong. *American Merchant Marine Ins. Co. vs. Liberty S. &*

G. Co. (C. C. A.) 282 F. 514; *Lewis vs. Jones* (C. C. A.) 27 F. (2d) 72; *Swenson vs. Snare & Trist Co.*, (C. C. A.) 160 F., 459.'

In *Merchants' & Miners' Transp. Co. vs. Nova Scotia S. S. Corp.*, 40 F. (2nd) 167, 168, the Circuit Court of Appeals for the First Circuit said: 'His (the trial judge's) conclusions should be adopted by this court—in which an admiralty case is tried *de novo*—unless plainly wrong. *Lake Monroe* [(C. C. A.) 271 F., 474], *supra; The Parthian* (C. C. A. 48 F., 564; *The Alijandro* (C. C. A.) 56 F., 621; *Alaska Packers' Ass'n vs. Domenico et al.* (C. C. A.) 117 F., 99, 101.' "

II.

THE PREFERRED MORTGAGE HELD BY APPELLEE WAS AT ALL TIMES A FIRST LIEN UPON THE "BERGEN" AND DESPITE ITS CANCELLATION AND THE ACCEPTANCE BY APPELLEE OF A CONVEYANCE NO MERGER RESULTED.

Based entirely upon the assumption that appellee had notice of appellant's "outstanding junior lien", an assumption which we have shown is not supported by the evidence and is in direct conflict with the express finding of the trial court, appellant invokes the doctrine of merger and argues that appellee's preferred mortgage lost its priority as a lien upon the "Bergen". That no merger would result in the absence of knowledge of the "junior lien" by the senior lienholder is recognized in the cases cited in appellant's brief, and that the appellee had no knowledge has been demonstrated in the preceding section of this brief.

Furthermore, despite appellant's assertion that the contrary view is "well established, both in this country and

England" (Appellant's Brief, p. 14), the authorities with almost complete unanimity lay down the rule that the doctrine of merger will not operate unless it is shown affirmatively that the mortgagee desired that his title as mortgagee be merged in his title as owner.

The law is stated in Corpus Juris as follows:

> "* * * the mortgagee does not, by taking a transfer of the equity, lose his priority over subsequent judgement or mortgage liens, if it is his intention and interest to keep his own security alive for that purpose, unless, in the deed which he receives, he expressly assumes the payment of other liens on the property, in which case his undertaking may be enforced by the other claimants." (41 C. J., 773.)
>
> "* * * Furthermore, a merger will not be allowed where it would work injustice or violate well established principles of equity or the intention of the parties." (41 C. J., 775-776.)
>
> "The question of whether a conveyance of the equity to the mortgagee results in a merger of the mortgage and fee is primarily one of the intention of the mortgagee. The mortgagee has an election in equity to prevent a merger and keep the mortgage alive, which he may do for his own protection as against other liens or encumbrances, even though he does not indicate his intention for a long time after the conveyance of the equity to him and not until another is about to acquire from him an interest in one of the estates. * * *" (41 C. J., 776-777.)
>
> "A merger will not be held to result wherever a denial of a merger is necessary to protect the interests of the mortgagee, the presumption being, in the absence of proof to the contrary, that he intended what would best accord with his interests. *On this ground a merger has been denied even where the conveyance was admittedly made in satisfaction and cancellation of the in-*

debtedness, or where the mortgagee took the conveyance under the mistaken belief that a merger would result but with no desire or agreement on his part to bring it about." (41 C. J., 779.) (Italics ours.)

"Where necessary to enable the mortgagee to defend his rights under his mortgage against intervening liens of third persons, a merger will not be held to have resulted if his intention to that effect is shown, or if there is nothing to rebut the presumption that his intention corresponded with his interest; and so if he was ignorant of the existence of such intervening liens or encumbrances a merger will be prevented." (41 C. J., 780.)

In California the courts have repeatedly announced the principle that where there is an intervening lien it will be presumed as a matter of law that the mortgagee intended to keep the mortgage alive.

In 18 Cal. Jur., 76-77, it is said:

" * * Indeed, it is presumed as a matter of law that the party must have intended to keep on foot his mortgage title when it is essential to his security against an intervening title or for other purposes of security; and this presumption arises although the parties, through ignorance of such intervening title or through inadvertence, have actually discharged the mortgage and canceled the notes with the intention to extinguish them."*

In *Hines vs. Ward,* 121 Cal., 115, plaintiff had a mortgage on the land of defendant Tunison. To prevent foreclosure costs Tunison asked the plaintiff to take a deed to the premises in satisfaction of the debt, which the plaintiff did without examination of the record. Plaintiff then surrendered and cancelled the note and satisfied the mortgage

of record. Defendant Richter, had previously recorded a judgment against Tunison. Plaintiff on learning of this brought an action asking that the satisfaction of the mortgage be cancelled and set aside and that he be restored to his rights thereunder and that the mortgage be foreclosed and the land sold. Mr. Justice Van Fleet, in delivering the unanimous opinion of the Supreme Court in bank, affirming the judgment awarding plaintiff the relief sought, said at pages 118, 119:

> "The contention of appellant is that the conveyance from Tunison had the effect to merge plaintiff's rights under the mortgage in the legal title carried by the deed, and relieve the land of the mortgage lien, thereby leaving it subject to the lien of appellant's judgment and liable to sale in satisfaction thereof.
>
> It is well established that equity will interpose to prevent a merger where from the circumstances it is apparent that it was not the intention of the grantee that a merger should take place; and where it appears to be for the interest of the grantee that there should be no merger of the lesser estate, such will be presumed to have been his intention. The rule is thus expressed by Mr. Jones: 'There is generally an advantage to the mortgagee in preserving his mortgage title; and, when there is, no merger takes place. It is a general rule, therefore, that the mortgagee's acquisition of the equity of redemption does not merge his legal estate as mortgagee so as to prevent his setting up his mortgage to defeat an intermediate title, such as a second mortgage or a subsequent lien, unless such appears to have been the intention of the parties and justice requires it; and such intention will not be presumed where the mortgagee's interest requires that the mortgage should remain in force. The intention is a question of fact.' (Jones on Mortgages, sec, 870.) And further:

'Even where the parties have undertaken to discharge the mortgage upon the uniting of the estates of the mortgagor and the mortgagee in the latter, it will still be upheld as a source of title whenever it is for his interest by reason of some intervening title or other cause that it should not be regarded as merged. *It is presumed as a matter of law that the party must have intended to keep on foot his mortgage title, when it was essential to his security against an intervening title or for other purposes of security; and this presumption applies, although the parties through ignorance of such intervening title, or through inadvertence, have actually discharged the mortgage and canceled the notes, and really intended to extinguish them.* * * * It may, therefore, be deduced from the authorities, as a general rule, that when the mortgagee acquires the equity of redemption in whatever way and whatever he does with his mortgage he will be regarded as holding the legal and equitable title separately, if his interest requires this severance. *The law presumes the intention to be in accordance with his real interest, whatever he may at the time have seemed to intend.*' (Jones on Mortgages, sec. 873.)"

It should be noted that the junior lien in *Hines vs. Ward* was recorded so that the plaintiff had constructive knowledge of its existence; that the plaintiff made no search of the records to discover if there were any liens; and that he satisfied the mortgage of record. Despite these facts no merger resulted and the mortgage lien was not destroyed.

In *Anglo-Californian Bank vs. Field,* 146 Cal., 644, action was brought to foreclose a mortgage executed to plaintiff by one Brandt, defendant Field's intestate. The defendant bank of Monterey filed a cross-complaint to foreclose its junior mortgage. After the suit was commenced defend-

ant Cowan bought from plaintiff the note and mortgage and later accepted a conveyance of the land from Brandt. The lower court foreclosed the mortgage of the bank of Monterey, as the first and only lien on the land, declaring that plaintiff and defendant Cowan were forever barred from asserting any claims. The Supreme Court reversed this decision, saying:

> "The court below erred in holding that the lien of the mortgage to plaintiff was extinguished and merged in the fee by the conveyance of the equity of redemption by Brandt to Cowan. The evidence on this subject is not conflicting, nor are the facts disputed. There is no evidence of the intention of Cowan to extinguish the lien of plaintiff's mortgage, except the inferences to be deduced from the assignment, in connection with the circumstances under which it was given and accepted, and the subsequent transactions between Cowan and Brandt. * * * Certainly these facts furnish no direct evidence of an intention to extinguish the first mortgage. The recitals and circumstances, in connection with the well-known rules of equity on the subject, imply an intention not to extinguish the lien, but, on the contrary, to keep it alive for the benefit of Cowan, the purchaser, as against the second mortgage. He did not assume the payment of either mortgage, nor undertake with Brandt that he would pay them. The recital that he should hold subject to both merely states the character which the law would give his holding if a third party had then held the Anglo-Californian Bank mortgage. When considered in connection with the fact that he himself then held that mortgage, the recital raises a strong presumption against any intention to extinguish it by virtue of the conveyance. The guaranty in the assignment that it was a first mortgage raises an equally strong presumption that there was no intention to extinguish the lien as against subsequent liens at the time

the assignment was made. It is true that, under ordinary circumstances, where the holder of a mortgage acquires the estate of the mortgagor, the mortgage interest is merged in the fee and the mortgage is extinguished. This is the ordinary legal effect of the transaction, and ordinarily the intention is presumed to accord with the act accomplished. *But this rule is never applied* where there is an intervening lien on the property, which it is to the interest of the purchaser to keep on foot, and *where there is no evidence,* direct or circumstantial, *of an express intention to extinguish the first mortgage and hold subject only to the second.* In such a case the legal title and first-mortgage lien will be considered as separate interests whenever necessary for the protection of the just rights of the purchaser. The question was fully considered in *Davis vs. Randall,* 117 Cal., 12. The law on the subject is well stated in the *syllabus* to that case in these words: 'The merger of mortgage liens with the fee, upon both being united in the same person, is a question of intent; and *merger will not be implied where there is an intervening claim,* but equity will keep the legal title and the mortgagee's interests separate, though held by the same person, whenever necessary for the full protection of his just rights; and if, from all the circumstances, a merger would be disadvantageous to the party holding the fee, his intention that merger shall not result will be presumed and maintained, and equity will keep the liens alive for the purpose of doing justice.' (See, also, *Hines vs. Ward,* 121 Cal., 118; *Scrivner vs. Dietz,* 84 Cal., 298; *Brooks vs. Rice,* 56 Cal., 428; *Rumpp vs. Gerkens,* 59 Cal., 496; *Carpentier vs. Brenham,* 40 Cal., 221; *Henderson vs. Grammar,* 66 Cal., 335; *Wilson vs. White,* 84 Cal., 243; *Tolman vs. Smith,* 85 Cal., 289; *Shaffer vs. McCloskey,* 101 Cal., 580; Jones on Mortgages, secs. 870, 873.)

That a merger of the lien of the first mortgage would operate to the disadvantage of Cowan, there can be no question. If the merger is not allowed to take

> place he is, of course, bound to take subject to the second mortgage, but upon a sale he would be entitled to receive out of the proceeds all the money due on the first mortgage, or he could keep the property by paying only the excess it brings over the first mortgage, whereas, if there is a merger, he would be bound to pay the second mortgage in full in order to keep the property he bought, or obtain any of the proceeds of its sale." (Pages 652, 653, 654.)
>
> * * * * * * *
>
> "We therefore hold that the mortgage to plaintiff was not merged by Cowan's purchase of the fee after he bought the mortgage." (Page 655.)

On a second appeal, to the Supreme Court the above holding was re-stated in *Anglo-Californian Bank vs. Field,* 154 Cal., 513, at pages 514, 515.

Applying the principles announced in the foregoing cases to the facts shown by the record the conclusion that there was no merger necessarily follows.

III.

THE TRIAL COURT CORRECTLY CONCLUDED THAT THE LIBELANT ACQUIRED NO LIEN WHATEVER UPON THE RESPONDENT VESSEL.

(A) Libelant, in the Exercise of Reasonable Diligence, Could Have Ascertained that the Mortgagor was Without Authority to Bind the Vessel for the Preferred Mortgage was of Record at the Port Where the Supplies were Furnished and by the Express Terms Thereof the Mortgagor was Precluded from Incurring any Lien for Supplies.

The gasoline and diesel oil for which appellant claims a lien were furnished to the respondent vessel at its home

port and upon the order of Mr. Heston. Under the general maritime law, and in the absence of statute, no lien would have been acquired under these circumstances.

The Lottawana, 21 Wall. 558, 22 L. Ed., 654;
The Valencia, 165 U. S., 264, 17 S. Ct. 323, 41 L. Ed. 710;
Alaska & P. S. S. Co. vs. C. W. Chamberlain & Co., (C. C. A. 9th) 116 Fed., 600.

Libelant's right to a lien therefore depends upon statute. The applicable statute is section 30 of the Ship Mortgage Act of 1920, subsections P, Q, and R. (46 U. S. C. A. Secs. 971, 972, and 973.)

Subsection P of the Act (46 U. S. C. A. Sec. 971) confers a lien to any person furnishing supplies upon the order of the owner of the vessel and further provides that, "* * * it shall not be necessary to allege or prove that credit was given to the vessel." Subsection Q (46 U. S. C. A. Sec. 972) designates the persons presumed to have authority from the owner. Subsection R (46 U. S. C. A. Sec. 973) after providing that the officers and agents of a vessel, designated in the preceding section, shall be taken to include such officers and agents when appointed by a charterer, by an owner *pro hac vice,* or by an agreed purchaser in possession of the vessel, goes on to provide as follows:

> "* * * but nothing in this chapter shall be construed to confer a lien when the furnisher knew, or by exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person

ordering the repairs, supplies, or other necessaries was without authority to bind the vessel therefor."

These sections of the Ship Mortgage Act of 1920 were based upon the Maritime Lien Act of 1910. (Act of June 23, 1910, Chapter 373, 36 Stat. L. 605.) Section 3 of the Act of 1910 is identical with the above quoted portion of section 973 with the exception that the words "subsection Q, section 972" replace the words "section 2" and the word "chapter" replaces the word "Act".

It would seem clear, as held by the learned trial judge (50 Fed. 2nd 447) that the libelant in this case exercised no diligence whatsoever to ascertain whether Mr. Heston, the person ordering these supplies was authorized to bind the vessel therefor. Had any diligence been exercised libelant could easily have determined that the mortgagor had, as Judge McCormick says, "by his own agreement in the documented and recorded mortgage, precluded himself from making purchases that would operate to attach a lien against the ship or that would be effective in pledging the credit of the ship for the supplies."

Appellant, however, contends (Brief, p. 30) that the case of *Morse Dry Dock & Repair Co. vs. S. S. Northern Star,* 271 U. S., 552, 70 L. Ed., 1082, is conclusive to the contrary. It is here to be remarked that certain language contained in this decision is the sole authority which able counsel for libelant have been able to unearth in support of their claim of lien. It is therefore proper to analyze the case at some length.

The facts in the Northern Star case briefly stated are as follows: The Morse Dry Dock & Repair Co. filed a libel for repairs on the vessel which, at the time the repairs were furnished, was being operated by the American Star Line, Inc. The intervening petitioner held a preferred mortgage by assignment from the United States. The mortgage in question contained the following clause:

> "* * * the party of the first part (the mortgagor) has no right, power, nor authority to suffer or permit to be imposed on or against the vessel any liens or claims which might be deemed superior to or a charge against, the interest of the party of the second part in the vessel."

The preferred mortgage had not been endorsed upon the ship's papers at the time the repairs were furnished, as provided for by section 30 of the Ship Mortgage Act of 1920. In the opinion of the District Court (*The Northern Star,* 295 Fed., 366) it is held that the provision of the Ship Mortgage Act requiring endorsement of the mortgage upon the ship's papers by the Collector of Customs was directory and not mandatory and that the failure of the Collector to make the endorsement would not deprive the mortgage of its preferred status. It was further held that by virtue of the above quoted clause in the mortgage, the American Star Line was not authorized to bind the vessel for the repairs in question and that no lien, therefore, attached. The case was reversed by the Circuit Court of Appeals. *The Northern Star,* (C. C. A. 2nd), 7 Fed. (2nd) 505. The Circuit Court of Appeals holds that the libelant acquired a lien for the repairs but that such lien was secondary to that of the mortgage

which the court holds was nevertheless a preferred mortgage despite the failure of the Collector of Customs to endorse the same upon the ship's papers. At page 506 it is said: "It will be observed from the foregoing provision of the mortgage that the owner covenanted not to permit a *prior* lien to the mortgage." (Italics ours.) The decision of the Circuit Court of Appeals was in turn reversed by the Supreme Court. (*Morse Dry Dock & Repair Co. vs. S. S. Northern Star,* 271 U. S. 552, 46 S. C. 489, 70 L. Ed. 1082.) In the opinion of the Supreme Court (Mr. Justice McReynolds dissenting) it is held that the failure of the Collector of Customs to make the endorsement upon the ship's papers required by the Ship Mortgage Act prevented the mortgage from attaining a preferred status. The majority opinion, written by Mr. Justice Holmes also concludes that the libelant acquired no lien.

It was the opinion of the learned trial judge who tried this case that the decision of the Supreme Court in the "Northern Star" case was in no sense controlling of the case at bar. We submit that the trial judge was right in this conclusion.

In the first place the clause contained in the mortgage involved in the "Northern Star" case was entirely different than the clause involved in the case at bar. The language of the mortgage on the "Northern Star" did not purport to do more than prohibit the imposition of *prior* liens. The Circuit Court of Appeals says on page 506, "* * * it will be observed from the foregoing provision of the mortgage that the owner, covenanted not to permit a *prior* lien to the

mortgage." (Italics ours.) Mr. Justice Holmes who wrote the majority opinion of the Supreme Court says at 271 U. S. 554, "* * * still when supplies are ordered by the owner, the statute does not attempt to forbid a lien simply because the owner has contracted with a mortgagee not to give any *paramount security* on the ship. The most that such a contract can do is to postpone the claim of a party chargeable with notice of it to that of the mortgagee." (Italics ours.) In other words in the Northern Star Case the mortgage attempted to prohibit *prior* liens, or in the language of Mr. Justice Holmes, *paramount* liens. The mortgage here, on the other hand, prohibits the imposition of *"any lien whatsoever"* other than certain specified exceptions. Obviously since the clause before the court in the "Northern Star" case, by its express language, was construed as containing no inhibition against the creation of a subsequent lien the conclusion of the court that the Morse Dry Dock & Repair Co. obtained a lien upon the vessel necessarily followed, irrespective of whether the mortgage was a preferred mortgage or not. As Mr. Justice Holmes remarks, "on these facts we feel no doubt that the petitioner got a lien upon the ship as was assumed by the Circuit Court of Appeals." The Bergen mortgage not only limits the imposition of a *prior* lien but it expressly precludes the mortgagor from creating a lien *either prior or subsequent* to that of the mortgage.

In the second place, since the Supreme Court concluded that the mortgage on the "Northern Star" was not entitled to a preferred status by reason of the Collector's failure to endorse it upon the ship's papers, it became entirely unnecessary to determine whether or not the clause

in question was effective to postpone the lien of the repairman to that of the mortgagee for if the mortgage was but an ordinary maritime mortgage it is elementary that the lien thereof would be outranked by that of the repairman. The opinion of Mr. Justice Holmes definitely states the question before the Court at page 555, "so the question more precisely stated is whether the above mentioned covenants postponed the lien to the mortgage security as they would seem to do on the facts of the case but for the language of the statute that we shall quote." The court then quotes the requirements prescribed by the statute to give a mortgage a preferred status. There is, we believe, in this language implied recognition of the effectiveness of a clause attempting to postpone the lien claims of others to that of a mortgage providing that the mortgage is preferred. The conclusion of the Supreme Court in the Northern Star Case was that the mortgage was not preferred and not being preferred it clearly was ineffective to postpone the admitted lien of the repairman.

The dissent of Mr. Justice McReynolds is obviously predicated upon a construction of the clause in question different from that of the majority. In his dissenting opinion Mr. Justice McReynolds refers to the covenant in question as having "deprived the owner of both right and authority within the true intent of the statute to create the lien now claimed by the repair company." This construction of the clause in question, was adopted by the Circuit Court of Appeals of the Third Circuit in *The American Star,* 11 Fed. (2d) 479. Mr. Justice McReynolds regarded the language of the clause contained in the mortgage be-

fore the court as a prohibition against the incurring of any lien whatsoever which is of course the purport and effect of the clause here involved. So construing the clause in the "Northern Star" Case, the conclusion of Mr. Justice McReynolds that the petitioner acquired no lien would seem sound and his remark that the argument in support of such conclusion "cannot be vaporized by mere negation" would seem appropriate.

The Northern Star holds then nothing more than this, —that a covenant by a mortgagor contained in an ordinary mortgage, not to impose upon the vessel any liens *prior* to that of the mortgage will not have the effect of postponing the lien of a repairman which, under general maritime law, is prior. Nothing more than this is decided by the Supreme Court.

The Fact That the Mortgage in the Case at Bar was a Preferred Mortgage is Material.

Counsel for the appellant, however, contend that the fact that the mortgage in this case is conceded to have the status of a preferred mortgage under the Ship Mortgage Act, whereas the mortgage in the "Northern Star" Case was but an ordinary mortgage, is immaterial. (Appellant's Brief, p. 35.) There is, we submit, no merit whatsoever to this contention. Indeed the fact that the mortgage here involved attained the dignity of a preferred mortgage is one of the two distinguishing features between this case and the "Northern Star" case.

It is elementary that an ordinary ship mortgage in admiralty has no maritime incidents and that any maritime

lien takes precedence over the lien of an ordinary mortgage irrespective of whether the mortgage be prior or subsequent. Courts of admiralty have even denied themselves jurisdiction to foreclose an ordinary ship mortgage.

In the case of *The J. E. Rumbell,* 148 U. S., 1, 13 S. C., 498; 37 L. Ed., 345; Mr. Justice Gray, speaking for the court, said:

> "An ordinary mortgage of a vessel, whether made to secure the purchase money upon the sale thereof, or to raise money for general purposes, is not a maritime contract. A court of admiralty, therefore, has no jurisdiction of a libel to foreclose it, or to assert either title or right of possession under it."

And in the early case of *The John Jay,* 17 How., 399; 15 L. Ed., 95, Justice Wayne, speaking for the court, said:

> "It has been repeatedly decided in the admiralty and common-law courts in England, that the former have no jurisdiction in questions of property between a mortgagee and the owner. No such jurisdiction has ever been exercised in the United States."

And further on in the same opinion he said:

> It (a mortgage) "is a contract without any of the characteristics or attendants of a maritime loan," and, "has nothing in it analogous to those contracts which are the subjects of admiralty jurisdiction."

In the case of *The Buckhannon,* 299 Fed., 519, the Circuit Court of Appeals of the Second Circuit, speaking through Judge Hough says: (p. 521)

> "* * * She was a mortgaged vessel, but it is a point too familiar to need citation that the mere fact that

there is a mortgage, *and not a preferred mortgage,* upon a ship, does not in the least prevent or limit the right of her owner, or that owner's lawful agents, to pledge the credit of the vessel by the incurring of a maritime lien. This is because the maritime lien is superior to the mortgage and takes no cognizance of the mortgage as such." (Italics ours.)

"* * * Doubtless the claimant, as well as the rest of the world, was affected with knowledge of the mortgage by reason of its recording; but, as above pointed out, it is fundamental that the mere existence of this *unpreferred mortgage amounted to nothing so far as the creation of maritime liens was concerned."* (Italics ours.)

And again at page 522:

"* * * Therefore this case becomes the ordinary one of the owner of a mortgaged vessel pledging its credit in such a manner as to create a maritime lien. That there is nothing in the mere existence of such *an unpreferred and non-maritime mortgage* to prevent the creation of a lien is not and cannot be seriously contested. * * *" (Italics ours.)

In the case of *The Ocean View,* Dist. Ct. Md., 21 Fed., (2d) 875, a libelant was asserting a lien for repairs and supplies furnished the steamer, "Ocean View." The intervening libelant held a mortgage upon the vessel. It was admitted that the mortgage did not comply with the provisions of the Ship Mortgage Act of June 5, 1920, and the question presented was whether the mortgage was entitled to any priority. The Court says: (p. 875)

"It is well settled that a mortgage, as generally understood, has no maritime incidents, and therefore is not a matter for admiralty jurisdiction, nor is it

> brought within such jurisdiction by the mere fact that it happens to be placed upon a ship. *Bogart vs. The John Jay,* 17 How., 399; 15 L. Ed., 95; *Schuchardt vs. Babbidge,* 19 How., 239; 15 L. Ed., 625. See, also *Benedict on Admiralty* (5th Ed.) Par. 77. * * *"

Express recognition of the limitations of the doctrine of The Northern Star (*supra*) is indicated by the following portion of the learned District Judge's opinion:

> "Since the mortgage here under consideration does not comply with the act, it confers no maritime lien at all, and must take the status assigned to common-law liens, which are subsequent to all maritime claims. See *Morse Dry Dock Co. vs. The Northern Star,* 271 U. S., 552, 46 S. Ct., 489, 70 L. Ed., 1082. * * *"

The above language would seem to dispose absolutely of appellant's contention in this regard. Not only is the fact that the claimant's mortgage here attained the status of a preferred mortgage a material fact in this case, it is a decisive fact which distinguishes the case from The Northern Star.

Concerning the Decided Cases Involving Limitations Upon the Authority of Charterers and Purchasers on Conditional Sale.

Appellant's next contention at page 36 of its brief, is that cases involving limitations of the authority of charterers or purchasers under conditional sales contracts are not in point. There appears to be no substantial distinction between cases involving a clause prohibiting the incurring of liens in a charter-party or a contract of conditional sale, and cases wherein the same clause is contained

in a duly documented, preferred mortgage of record in the very port where the supplies upon which the claim of lien depends were furnished to the vessel. Neither reason nor authority supports the attempted distinction. It would seem anomalous to hold that the identical clause if embodied in a contract of conditional sale would have the effect of precluding the attachment of liens on the vessel but would not have that effect if embodied in a preferred mortgage.

In the leading case of *United States vs. Carver,* 260 U. S., 482; 43 S. Ct., 181; 67 L. Ed., 361, libels were filed for supplies furnished to the steamships Clio and Morganza, which were operated by the State Steamship Corporation under charters which contained a clause that "the charterers will not suffer nor permit to be continued any lien" etc. The opinion of the Supreme Court, written by Mr. Justice Holmes and concurred in by all the justices, first construed the clause there involved as intending to preclude the attachment of any lien. The Court says: "but the primary undertaking is that a lien shall not be imposed." It was held that libelants obtained no lien upon either vessel. The Court says, at page 488:

> "* * * The Act of 1910, by which the transactions with the Clio were governed, after enlarging the right to a maritime lien, and providing who shall be presumed to have authority for the owner to procure supplies for the vessel, qualified the whole in Par. 3 as follows: 'But nothing in this act shall be construed to confer a lien when the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies or other neces-

saries was without authority to bind the vessel therefor.' "

The Court then goes on to say:

> "We regard these words as too plain for argument. They do not allow the materialman to rest upon presumptions until he is put upon inquiry,—they call upon him to inquire. To ascertain is to find out by investigation. If, by investigation with reasonable diligence the materialman could have found out that the vessel was under charter, he was chargeable with notice that there was a charter; if, in the same way, he could have found out its terms, he was chargeable with notice of its terms. In this case it would seem that there would have been no difficulty in finding out both. The Ship Mortgage Act of 1920 repeats the words of the Act of 1910."

In *North Coast Stevedoring Co. vs. United States,* 17 Fed. (2d) 874, this court was presented with a case wherein the libelant and appellant asserted a maritime lien on the steamship Henry S. Grove, for stevedoring services. At the time the services were performed the vessel was operated under a conditional sales contract executed by the United States to the Atlantic, Gulf, & Pacific Steamship Corporation. The agreement for sale contained a clause providing that the purchaser should have no power or authority to suffer or permit to be imposed upon the vessel "any liens or claims which might be deemed superior to or a charge against the interest of the seller." It is to be noted that this clause likewise does not express such a clear limitation upon the authority of the purchaser to incur liens as does the clause in the case at bar. This is recognized by this court in its opinion at page 875 where it is stated:

> "While the prohibition against incurring liens is not as explicit as it might be, yet, when the agreement is construed as a whole, it leaves no doubt in the mind that it was the purpose and intent of the seller to protect the vessel against claims and liens that would have priority to, or preference over, the title of the government. * * *"

So construed this court held that the libelant acquired no lien whatever upon the vessel and accordingly the decree of dismissal was affirmed.

In *The Golden Gate,* 52 Fed. (2d) 397 the charter party did not forbid the creation of liens and accordingly this court applied the rule of *The South Coast,* 247 Fed., 84, which was later affirmed by the Supreme Court in *The South Coast,* 251 U. S., 519, 40 S. C., 233, 64 L. Ed., 386.

The S. W. Somers, 22 Fed., (2d) 448.

In this case a conditional sales agreement contained the following clause:

> "The buyer shall not suffer nor permit to be continued any lien or charge having priority to or preference over the title of the seller in the vessel or any part thereof,"

It is to be noted that this clause is by no means as clear a prohibition against incurring of liens as is involved in the case at bar. Nevertheless the learned District Judge held that the repairman obtained no lien. After referring to a number of cases the learned judge says: (p. 449)

> "All of these decisions deal with supplies and repairs, and would seem to leave no doubt of the law,

> where they are furnished under conditions such as exist in the present case. There is no proof that any of the claimants has satisfied the rule of diligent inquiry imposed upon him by the act. * * *"

In *The Chester,* Dis. Ct. Md., 25 Fed. (2d) 908, various libels for repairs were asserted against the vessel, which, at the time the services were rendered, was under charter. This charter contained almost the identical language contained in the mortgage in this case, viz:

> "the said charterer and the said master and officers shall have no right, power or authority to create, incur or permit to be imposed upon said steamer any liens whatsoever, * * *"

Upon the authority of *United States vs. Carver, supra,* and *The S. W. Somers, supra,* the libel of the repairman was dismissed.

The Eureka, (Dist. Ct. Cal.) 209 Fed., 373.

In this case the Eureka was being operated under an option to purchase from the owner. This option was in writing and expressly provided that the operator should not incur any lien upon the vessel. The libelant furnished certain supplies to the vessel at her home port in San Francisco. In dismissing the libel Judge Dooling refers to the provisions of section 3 of the Act of June 23, 1910, and tersely remarks: "the Act upon which libelant relies defeats his right to a lien," and further says:

> "* * * yet by the exercise of the slightest diligence libelant could have ascertained that because of the terms of the agreement for sale of the vessel Capt.

Woodside was without authority to bind the vessel for any repairs or supplies."

In *United States vs. Robins Dry Dock & Repair Co.,* (C. C. A. 1st) 13 Fed. (2d) 808, the court says: (p. 812)

> "We are of the opinion that the sales agreement denied to the Elder Company the power to impose liens on ship or on freight moneys for supplies, stevedoring services, or repairs. The proofs show, we think, that under the rule of reasonable diligence laid down in *United States vs. Carver,* 260 U. S., 482, 43 S. Ct., 181, 67 L. Ed., 361, *supra,* none of the lienors in the instant case used such diligence. If the lienors had attempted to obtain accurate information, they could have readily found it from reliable sources by examining the ship's papers, or by inquiring of the Shipping Board, or of the Elder Company, to see the contracts under which the ship had been acquired and under which it was being operated. We think they were charged with knowledge of the terms of these agreements and that they did not acquire maritime liens upon the ship."

In the case of *The Roseway* (C. C. A. 2d) 34 Fed. (2d) 130, the libelant asserted a lien against the vessel for supplies. The vessel was under charter which expressly stated that the charterer would "not have the right to incur, nor will it allow to arise or attach any maritime lien." It was held that the libelant acquired no lien upon the vessel. In so holding the court quotes from the opinion in the case of *Morse Dry Dock & Repair Co. vs. United States,* 1 Fed. (2d) 283, as follows, (P. 132):

> "The facts were readily ascertainable; the inquiry into the facts was a duty under the statute, and when a

duty to make inquiry exists, it must appear that the one whose duty it was to inquire prosecuted his inquiry with all the care and diligence required of a reasonably prudent man," and "that duty is not discharged by accepting the statement of an interested party without any examination of the title papers which would have disclosed a want of power to create a lien upon the property involved."

In the recent case of *The Olympia,* (Dist. Ct. Conn.) 58 Fed. (2d) 638, the court says with reference to the applicable provision of the Ship Mortgage Act, at page 642:

> "Under this statute, it is authoritatively established that no lien at all arises in favor of one furnishing repairs and supplies to a chartered vessel at the request of the charterer, where reasonable investigation would have disclosed that there was a charter which forbade such liens. *U. S. vs. Carver,* 260 U. S., 482, 43 S. Ct., 181, 67 L. Ed., 361; *The Roseway* (C. C. A.) 5 F. (2d) 131; *The Capitaine Faure* (D. C.) 5 F. (2d) 1008; *Id.* (C. C. A.) 5 F. (2d) 1009; *The Anna E. Morse* (C. C. A.) 286 F. 794; *Frey & Son vs. U. S.* (C. C. A.) 1 F. (2d) 963.
>
> It is impossible to find any basis for distinction between the rights of one furnishing to a charterer and one furnishing to a conditional vendee of the vessel. Indeed, the cases fully indicate that the rule applies where the repairs are ordered by a conditional vendee in possession. *North Coast Stevedoring Co. vs. U. S.* (C. C. A.) 17 F. (2d) 874; *U. S. vs. Robins Dry Dock Co.* (C. C. A.) 13 F. (2d) 808; *The S. W. Somers* (D. C.) 22 F. (2d) 448; *Morse Dry Dock Co. vs. U. S.* (D. C.) 298 F. 153; *Id.* 266 U. S. 620, 45 S. Ct. 99, 69 L. Ed. 472."

In connection with its contention that a lien was acquired appellant has advanced the suggestion that the clause in the

mortgage forbidding the mortgagor from incurring other than certain specified liens is invalid as a "clog upon the equity of redemption." (Appellant's Brief, p 36.)

No authority is cited in support of this proposition other than a statement from Pomeroy, Equity Jurisprudence the substance of which is that it is not competent for parties to a mortgage, by provisions therein, to alter or modify the statutory period of redemption or to attempt in derogation of the statute, to specify who may exercise the right of redemption. Obviously this is not in point.

CONCLUSION.

It is finally submitted that appellant acquired no lien whatever upon the respondent vessel since it failed to exercise the slightest diligence to ascertain whether the person ordering the supplies was authorized to bind the vessel. Of record in the very port where the supplies were furnished and attached to the ship's papers on board the vessel was the preferred mortgage wherein, in plain and unambiguous terms, Mr. Heston had precluded himself from incurring the lien now contended for. In no event, even if a lien were acquired by appellant, could that lien have outranked the admitted prior lien of the preferred mortgage. Nor was the priority of the preferred mortgage lost by the acceptance by the appellee of a conveyance of the vessel from the mortgagor since appellee had neither actual nor constructive notice of any claim against the vessel by libelant and since as a matter of law an intention against merger is presumed.

For the foregoing reasons the decree of the trial court should be affirmed.

Respectfully submitted,

GRAY, CARY, AMES & DRISCOLL,

J. G. DRISCOLL, JR.,

Proctors for Claimant and Appellee.